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BY

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AND

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"Δεῖ καὶ τὰς ἄλλας ἐπισκέψασθαι πολιτείας . . . ἵνα τό τ' ὀρθῶς ἔχον ὀφθῃ καὶ τὸ ἐχρήσιμον."—Arist. *Pol.* II. 1.

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PRESIDENT WILSON.

[*Contributed by* SIR COURTENAY ILBERT, G.C.B., K.C.S.I.]

PRESIDENT WILSON has, in the subjoined letter, told me that he is complimented by the desire of our Society to prefix his portrait to this number of our Journal. The President has always taken great interest in the work of our Society, being aware that one of our main objects is to collect, arrange, and disseminate throughout the British Dominions information about the laws and institutions of the United States of America, and that no more useful work can be performed.

President Wilson needs no biographical notice here. He is, at this hour, the spokesman, the acknowledged and honoured spokesman, of all those who, in any quarter of the globe, speak the English language and have inherited and developed English traditions. He is more even than that. He is the greatest international man in the world. He is, for men of every race, creed, and tongue, the foremost champion of freedom against military despotism. And for this reason we all unite in paying him a grateful meed of honour.

[*Copy.*]

THE WHITE HOUSE,
WASHINGTON.
January 17, 1918.

MY DEAR SIR COURTENAY ILBERT,

I have your courteous letter of December and am not only willing that the Journal of the Society of Comparative Legislation should use my photograph as a frontispiece, but am complimented that you should desire to publish it in any way. I am taking pleasure in sending an appropriate photograph.

With very good wishes,
Sincerely yours,
(*Signed*) WOODROW WILSON.

SIR COURTENAY ILBERT, G.C.B., K.C.S.I., C.I.E.,
Society of Comparative Legislation,
London, England.

AMERICAN INFLUENCE UPON INTERNATIONAL LAW.

[*Contributed by* JENS I. WESTENGARD, ESQ., *Bemis Professor of International Law in the Law School of Harvard University.*

THE extent of influence is a matter of opinion. In regard to it one cannot very well be dogmatic, but one may form and express an opinion, and in support of it set forth the grounds on which it is based. In so far as concerns the subject of this article, two points at least are open to discussion: in the first place, what is the American view on certain topics of international law; in the second place, how far has that view exercised an influence in shaping the rules of international law? The American view may be deduced from (1) the decisions of the Courts; (2) acts and public documents of the legislative and executive departments; (3) writings by authors of acknowledged authority. In like manner, the exercise of American influence may be gathered from similar sources in other countries.

To the American government have been offered unusual opportunities for the development of the principles of international law—opportunities such as would not be open to even a newly created State carved out of the continent of Europe. The physical isolation of the western continents, which continued until the specialised application of steam power to ocean traffic, and, in some degree, still continues; the absence of traditions of administration and political relationship which must almost necessarily inhere in European territory; the institution of a government by the people, as contrasted with the monarchical non-constitutional forms of government in Europe at the end of the eighteenth century—out of these conditions it might be expected that there should be developed an independent and less restrained attitude toward questions of international law. But it must also be remembered that the new State

was weak; its resources had hardly been tapped; its population was slight in proportion to its vast area, and that area was soon to be enlarged; it was exhausted by war, and the task of establishing cordial relations with the country from which it had won its independence took much time. So it is not surprising if, in its early history, it was not always able to realise or to insist upon the realisation of its ideals of international relations.[1] Recognition of the status of the United States as a great Power was not really accorded until the Union had survived the ordeal of the Civil War.[2]

Anything like a complete statement of the influence of America on international law would require an examination of all the subjects on which conceivably that influence has been exerted. This is of course beyond the bounds of an article; but something less may be attempted by the selection of some of these subjects.

International Law as a Part of Municipal Law.—On the preliminary question how far international law is a part of municipal law, the Courts of both England and the United States are substantially in accord. Lord Mansfield said [3] (following Lord Talbot in an earlier case) that "the law of nations, in its full extent, was a part of the law of England." [4] The United States Supreme Court in 1899 [5] expressed itself to the same effect as Lord Mansfield, saying that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." [6]

[1] For an example of the difficulties by which the young republic was confronted see the statement in *Gray, Administrator*, v. *United States*, 21 Court of Claims 340, 356–61, of the conflict between the 1778 treaties of commerce and alliance with France and the Jay treaty of 1794 with Great Britain.

[2] 1 Oppenheim, *International Law* (2nd ed.) 70, 171. But "the United States has in reality always been, in the fullest and highest sense, a world-Power."—Moore, *American Diplomacy*, Prefatory Note.

[3] In *Triquet* v. *Bath*, 3 Burr. 1478.

[4] Even in so far as concerns customary international law, this statement has been limited by the Lord Chief Justice in *West Rand Mining Co.* v. *The King*, [1905] 2 K.B. 391.

[5] Mr. Justice Gray in *The Paquete Habana*, 175 U.S. 677, 700.

[6] "It is true that [the Courts of Great Britain and the United States] adopt and apply established principles of international law, but in so applying and enforcing them they consider them as having been first impliedly adopted by the English or American State, as the case may be, as a portion of its municipal law. Thus, in fact, these principles are recognised and enforced, not as international law, but as municipal laws."—W. W. Willoughby, "The Legal Nature of International Law," 2 *American Journal of International Law*, 357.

Treaties.—As to the position of treaties in the English Courts, it is said [1] that "in England there is no codified list of subjects upon which the Crown has power to bind the subject by treaty without preliminary sanction. But where any reasonable doubt arises, it is usual either to obtain statutory authority beforehand, or to stipulate in the treaty that the consent of the legislature shall be obtained." In the United States the position of treaties is settled by Art. 6, s. 2, of the Federal Constitution.[2] It provides that all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.[3] In this connection it is to be remembered that in the United States the ratification of a treaty requires the consent of the Senate.[4] In England, treaties are still negotiated and ratifications of treaties are exchanged by the Crown acting through the Cabinet. But in most of the countries of Europe, the example of the United States constitution has been followed, and the assent of the legislative assembly is required to the ratification of at least certain classes of treaties.[5]

The Most-favoured-Nation Clause.—In the commercial treaties of the nineteenth century, it was customary to embody a "most-favoured-nation" clause. At an early date the American Government expressed, and it has since maintained, an attitude as to the effect of this clause which is at variance with the views of most of

[1] 6 Halsbury, *Laws of England*, 440, note (*e*).

[2] The history of the constitutional provision is stated briefly and clearly in "John Marshall," by Professor John Bassett Moore, 16 *Political Science Quarterly*, 400–402. See also 7 Moore's *Digest of International Law*, 310.

[3] "This difference might seem to imply that the rule of international law requiring that treaties shall be observed was incorporated with the law of the United States, though not with the law of England. But it is not so. The difference is merely that the executive possesses in the United States a power of making law by treaty not paralleled in England. That the faith of treaties is treated in the same way in the two countries is proved by the fact that as the treaties of the United States repeal their common law and their previous legislative Acts, so they are in turn repealed by subsequent Acts of Congress, and the question whether such repeal was contrary to international good faith and law will not be entertained."—Westlake, *Collected Papers*, 500. Observe, however, that the power of the American executive to make treaties requires the co-operation of one of the legislative bodies; see next note.

[4] The President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."—Constitution, Art. 2, s. 2, par. 2.

[5] Quincy Wright, "The Legal Nature of Treaties," 10 *American Journal of International Law*, 706, 712.

the States of Europe. As stated by Professor Oppenheim in his *International Law*, the difference is this: "Whereas in former times the clause was considered obviously to have the effect of causing all favours granted to any one State *at once and unconditionally* to accrue to all other States having most-favoured-nation treaties with the grantor, the United States contended that these favours could accrue to such of the other States only as *fulfilled the same conditions under which these favours had been allowed to the grantee.*" [1] European criticism of the American view is severe.[2] But it may be pointed out that, after all, the question is one of the interpretation of a written document, and that the European interpretation tends to rigidity and fixity in international relations; it discourages and often prevents the making of special arrangements between two countries when by reason of particular conditions (such, for example, as geographical proximity) special arrangements are desirable or necessary. The American interpretation encourages a freer development of commercial and other international agreements, and seems more fair to all concerned. It is perhaps for these reasons that the United States Supreme Court in 1887 [3] confirmed the American view.[4]

Naturalisation.—The subject of naturalisation of aliens has attracted and held the attention of the American Government from the beginning. Art. 1, s. 8, of the Federal Constitution grants to Congress the power "to establish a uniform rule of naturalisation." This power was exercised by the first Congress through the Act of March 26, 1790.

It is true that each country settles by its municipal legislation the terms on which it will admit aliens to citizenship; but since

[1] S. 580: "In Europe this clause has been uniformly treated as applying to all reductions of tariff without distinction. The United States' interpretation, on the other hand, distinguishes between reductions of a general character and reductions made specifically in return for reductions by some other State. The latter do not come within the operation of the clause, and a co-contracting State is only entitled to obtain extension of them to itself by granting similar concessions. In other words, special concessions to any co-contracting State are only allowed gratuitously to a third co-contracting State, when nothing is given for them, the clause not covering advantages given in return for advantages."—Barclay, *Problems of International Practice*, 137.

[2] "No strictly judicial argument can be urged in support of the American view."—Barclay, *op. cit.* 138.

[3] In *Whitney* v. *Robinson*, 124 U.S. 190.

[4] Japan seems to share it. 5 Moore Dig. 267

there is no uniformity in the naturalisation laws of different countries instances of double nationality arise frequently. When faced by these conflicting claims, the judicial and executive department of every State must answer these questions: (1) Shall our naturalised subjects, when abroad, be protected in the same manner as our native-born citizens? (2) Shall we admit that our own subjects may lose their nationality by being naturalised abroad? Consistency requires a choice between the doctrine of perpetual or indelible allegiance and the recognition of the right of expatriation. The American Courts followed the rule of the English law, and adopted the principle that a citizen or subject could not renounce his allegiance without the consent of his government—the doctrine of perpetual allegiance. The executive department did not hold with steadfastness to either doctrine, but inclined to admit the right of expatriation.[1] Finally, changing social conditions, due to the great increase in immigration, brought about the enactment by Congress of the Act Concerning American Citizens in Foreign States of July 27, 1868. The Act asserted in the clearest language the right of expatriation,[2] and assured all naturalised citizens of the United States that, while in foreign States, they should receive the same protection of person and property accorded to native-born citizens in like circumstances.[3]

By the Naturalisation Act of 1870, s. 6, Great Britain abandoned the doctrine of perpetual allegiance and recognised the right of a British subject to expatriate himself by naturalisation in a foreign State. S. 7 provided for the naturalisation of aliens. But the protection which the British Act extended to a naturalised subject stopped short of assuring to him the protection of the British Govern-

[1] 3 Moore Dig. 562–79.

[2] "Any declaration, instruction, opinion, order, or decision of any officers of this Government which denies, restricts, impairs, or questions the right of expatriation is hereby declared inconsistent with the fundamental principles of this Government."

[3] S. 3 of the Act made it the duty of the President, whenever an American citizen was unjustly deprived of his liberty by a foreign Government, "to use such means, not amounting to acts of war," as he might think necessary to obtain the release of the person in question.

In case the person thus naturalised as an American citizen returns to the country of his origin, the endeavour to enforce the duty thus laid upon the President may result in controversy with that country. For instances of treaty arrangements to deal with the situation thus arising, see 1 Oppenheim, *International Law* (2nd ed.) 389; 3 Moore Dig. ss. 390–400.

ment if he returned to the country of his origin, unless he had ceased to be a subject of that country under its laws or by a treaty to that effect (s. 7, par. 3). The Act of 1870 has been superseded by the Act to Consolidate and Amend the Enactments relating to British Nationality and the Status of Aliens of August 7, 1914. Since Art. 3, par. 1, of the Act of 1914 confers upon a naturalised person the status of a natural-born British subject, and since the provision of Art. 7, par. 3, of the Act of 1870 has been omitted, the British Parliament seems now to have adopted the point of view of Congress in 1868.

While the tendency of American and British law has been to discourage the voluntary assumption of double nationality,[1] the German law has facilitated the retention or resumption of German nationality by Germans naturalised abroad.[2]

International Arbitration.—In no branch of foreign relations has the United States pursued a more continuous policy, or one attended with more satisfactory results, than that of the peaceful settlement of international disputes. The birth of a new State is usually the result of a violent struggle, and the creation of the American Union was only brought about by a long and exhausting war. Soon after the close of that war a treaty of commerce with Great Britain was signed which contained provisions for the settlement by arbitration of three important questions.[3]

With the exception of the events of 1812–14, no question has arisen with Great Britain which has not yielded to the processes of negotiation or arbitration. The outstanding example of the peaceful settlement of international disputes is the Treaty of Washington,

[1] Before an alien can be naturalised in the United States, he must abjure all allegiance to any foreign sovereign, "and particularly, by name, to the prince potentate, state, or sovereignty of which he was before a citizen or subject."

[2] Flournoy, "The New German Law of Nationality," 8 *American Journal of International Law*, 478, 480. At p. 484 it is said that in America "applicants for naturalisation were never required to obtain the consent of their original sovereigns, before acquiring American citizenship." But events occurring during the present war emphasise the desirability of an unquestionable single allegiance.

[3] The Jay treaty of 1794. The questions were: Art. 5, the international boundary; Art. 6, indemnification of British subjects for debts sequestrated by the States; Art. 7, indemnification of American citizens for irregular captures, etc., by Great Britain while she was a belligerent and the United States was a neutral. The importance of the last-mentioned arbitration agreement is shown by the award against Great Britain, which amounted to $11,656,000. 1 Malloy, *Treaties of the United States*, 590 *et seq.*

signed by the United States and Great Britain on May 8, 1871. By it provision was made for four arbitrations. By far the most important of these was that which settled differences between the two governments "growing out of acts committed by several vessels which have given rise to claims generically known as the '*Alabama* claims.'" [1]

While arbitrations have been most numerous with Great Britain, the same method has been successfully employed with a number of other States.[2] With the exception of the case of Mexico, in 1846–8, and Spain, in 1898, differences between the United States and other States have not resulted in hostilities until April 1917.

A supporter of the principle of the extension of arbitration, the United States took an active part in the work of the two Hague Conferences. It was a party to the case of the Pious Funds of the Californias, the first case to be submitted to the Permanent Court at the Hague, and it has been a party to three of the other fourteen cases adjudicated upon by that tribunal.

Perhaps one reason for the favour shown to international arbitration by the United States has been the example set by the exercise of jurisdiction by the federal Supreme Court in controversies among the States of the Union. The States are, with respect to each other, foreign, except in so far as they have delegated powers to the federal government. By Art. 3, s. 2, of the Constitution, the judicial power of the federal government is extended to controversies to which the United States shall be a party and to controversies between two or more States. The Supreme Court has taken jurisdiction over a suit by one State against another, and also over a suit by the United States against a State in regard to boundaries; [3] by one State, or by the United States itself, against another State to enforce a bond; [4] by one State to restrain another State from building a

[1] 1 Malloy, *Treaties*, 701.

[2] Moore, *American Diplomacy*, 215, after citing arbitrations with France and Mexico, says: "Arbitrations have also been held by the United States with Colombia, Costa Rica, Denmark, Ecuador, Hayti, Nicaragua, Paraguay, Peru, Portugal, Salvador, Santo Domingo, Siam, and Venezuela. The total number of the arbitrations of the United States down to 1900 was fifty-seven. . . . The number of the arbitrations of the United States during that period was equalled only by those of Great Britain, the total of which appears to have been the same."

[3] "Most of the suits between States of which the federal Supreme Court has assumed jurisdiction have involved boundary disputes."—J. P. Hall, *Cases on Constitutional Law*, 1394, note.

[4] *United States* v. *North Carolina*, 136 U.S. 211; *South Dakota* v. *North Carolina*,

drainage canal which it was alleged would result in fouling running waters in the plaintiff State ;[1] by one riparian State to restrain another riparian State from diverting the waters of a river to the detriment of the lower State.[2] In some of these cases the defendant contended that as a sovereign and independent State she was as fully in control of the natural resources within her territorial boundaries as any other sovereign and independent State ; that boundary disputes are questions of a political nature involving jurisdiction and sovereignty and outside of the domain of municipal law. But it was answered that the Constitution does not contemplate that controversies between members of the Union may be settled by reprisal or force of arms or even by negotiation.[3] " If a State of this Union deprives another State of its rights in a navigable stream, and Congress has not regulated the subject, as no treaty can be made between them, how is the matter to be adjusted ? "[4] The Court replied to the question by taking jurisdiction, and said that " Sitting, as it were, as an international as well as a domestic tribunal, we apply federal law, State law, and international law, as the exigencies of the particular case may demand."[5]

In these cases we see instances of jurisdiction exercised over sovereign States in regard to questions which are beyond the jurisdiction of ordinary municipal Courts and which, if they arose between two States of Europe, could be settled only by diplomatic negotiation and, that failing, by war.[6] An example is thus set of the judicial settlement of international disputes.

192 U.S. 286. So also *Virginia* v. *West Virginia*, 220 U.S. 1—money due under a contract.

[1] *Missouri* v. *Illinois*, 180 U.S. 208. The case was afterwards dismissed on the merits ; *Missouri* v. *Illinois*, 200 U.S. 496.

[2] *Kansas* v. *Colorado*, 185 U.S. 125. And see the same case in 206 U.S. 46.

[3] The Federal Constitution, Art. 1, s. 10, par. 3, forbids any State to enter into any agreement or compact with another State, or with a foreign power.

[4] Fuller, C.J., in *Kansas* v. *Colorado*, 185 U.S. 125, 144.

[5] When the case came up again, the Court said : " Nor is our jurisdiction ousted even if, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal. . . . Through these successive disputes and decisions this Court is practically building up what may not improperly be called interstate common law." 206 U.S. 97, 98.

[6] " The only question presented was whether, as between States of the Union, this Court was competent to deal with a situation which, if it arose between independent sovereignties, might lead to war."—Holmes J. in *Missouri* v. *Illinois*, 200 U.S. 496, 518.

But the principle must not be carried too far. The Supreme Court has not been prepared to extend its jurisdiction to cover all questions between the States. It has declined jurisdiction over a suit to restrain a State from enforcing its statutes within the territory of an Indian tribe.[1] It has refused to enforce the duty of interstate rendition of fugitives from justice, although the duty was imposed by the Constitution (Art. 4, s. 2, par. 2) and the necessary machinery had been provided by an Act of Congress.[2] It has refused to restrain the enforcement within a State of the federal Reconstruction Acts after the Civil War.[3] In these cases jurisdiction has been declined because the interposition of the Court would be the exercise of political and not judicial power; because the questions at issue are of a political character "and wholly unfit for the cognisance of a judicial tribunal."[4] The limitation thus imposed by the Court upon its jurisdiction reminds one of the exception of "vital interests" and "national honour" in general arbitration treaties.

It would be no small contribution to international good relations if the example thus set might be followed (necessarily with limitations as to the nature of the questions at issue) in the settlement by an international Court of situations which, if they arose between independent sovereignties, might lead to war.[5]

The Duties of Neutrals.—What is probably the most striking American contribution to international law is found in the field of neutral rights and duties.[6] Until the last quarter of the eighteenth century, these were ill defined. While the relations of belligerents to each other had been studied, the working out of definite rules of law governing the relations of belligerents with third Powers had not made much progress. In Europe the foundations for a development of this relationship were being laid in treaties; but these

[1] *Cherokee Nation* v. *Georgia*, 5 Peters 1.
[2] *Kentucky* v. *Dennison*, 24 Howard 66.
[3] *Stanton* v. *Georgia*, 6 Wallace 50.
[4] Johnson J. in *Cherokee Nation* v. *Georgia*, 5 Peters 1, 28.
[5] See note 6, p. 9.
[6] "The policy of the United States in 1793 constitutes an epoch in the development of the usages of neutrality. There can be no doubt that it was intended and believed to give effect to the obligations then incumbent on neutrals. But it represented by far the most advanced existing opinions as to what those obligations were, and in some points it even went further than authoritative international custom has up to the present time advanced. In the main however it is identical with the standard of conduct which is now adopted by the community of nations."—W. E. Hall, *International Law* (1st ed.) 515.

treaties often sanctioned the doing of acts which are in violation of the obligations of enlightened neutrality. At first the United States showed a tendency to follow the precedents of the Old World.[1] Hostilities in Europe, especially those between Great Britain and France, soon placed the government in a position where it was obliged to choose between joining in the strife and standing aloof from it. Under the direction of the first President, the government chose the latter position, and on April 22, 1793, Washington issued a proclamation announcing "a conduct friendly and impartial toward the belligerent Powers." Popular opinion was against this attitude, and leaned toward helping France. A federal District Court refused jurisdiction of a libel for the restitution of British merchantmen taken by French privateers outfitted in American ports, even though the capture occurred within American territorial waters.[2] But in the great case of the *Betsey*[3] the United States Supreme Court decided, in February 1794, that the federal District Courts had

[1] The following may serve as an instance of the development of American views. Art. 17 of the 1778 treaty with France made mutual provision for shelter for prizes of war, and added: "On the contrary, no shelter or refuge shall be given in their ports to such as shall have made prize of the subjects, people, or property of either of the parties." Art. 19 of the 1783 treaty with Sweden provided shelter for prizes, but did not exclude shelter for the prizes made by enemies of the parties. Art. 25 of the 1794 treaty with Great Britain was substantially like Art. 17 of the 1778 treaty with France, but stated that "nothing in this treaty contained shall be construed or operate contrary to former and existing public treaties with other sovereigns or States." Art. 19 of the 1799 treaty with Prussia provided for shelter for prizes, but added that "conformably to the treaties existing between the United States and Great Britain, no vessel that shall have made a prize upon British subjects shall have a right to shelter in the ports of the United States" except in case of accident of the sea, and then they were obliged to depart as soon as possible.

As to the difficulties arising with France out of the 1778 treaty with her and the 1794 treaty with Great Britain, see *Gray, Administrator*, v. *United States*, 21 Court of Claims 340, 356.

In this connection it may be noted that Art. 21 of the 13th Hague Convention (1907) provides that a prize may only be brought into a neutral port on account of unseaworthiness, etc., and that it must leave as soon as the circumstances which justified its entry are at an end. Art. 23 of the same Convention permits a neutral to allow prizes to enter its ports when they are brought there to be sequestrated pending the decision of a prize court. Great Britain made reservation as to Art. 23, and the United States excluded Art. 23 when it adhered to the Convention. "From the history of the [Hague] conference it appears that the reason for the attitude of the American delegates in refusing to accept Art. 23 was that thereby a neutral might be involved in participation in the war to the extent of giving asylum to a prize which the belligerent might not be able to carry to a home port."—Day J. in *The Steamship Appam*, 243 U.S. 124, 151.

[2] *Findlay* v. *The Ship William*, 1 Peters' Admiralty, 12.

[3] 3 Dallas 6.

jurisdiction in regard to prizes made by a belligerent cruiser outfitted within the United States when the latter was neutral. At the time of this decision, there was no American legislation on the subject. On June 5, 1794, Congress enacted the Neutrality Act, forbidding, under penalty, various acts (such as enlistment and fitting out cruisers within the United States, setting on foot military expeditions and the like) directed against a State with which the United States was at peace. This was re-enacted on April 20, 1818, and the last-mentioned Act formed the basis of the British Foreign Enlistment Act of 1819.[1] In 1870 it was found necessary to amend the British Act in important particulars. This time the United States lagged behind, and these desirable amendments were not made until the Act of Congress of June 15, 1917.[2]

The Rules and Usages of War.—The history of the United States has been one of peace, broken only at long intervals (1812, 1846, 1861, 1898 and 1917), so it may well be described as not a military nation.[3] Yet even in the field of war, the United States has made contributions to international law. Chief among these are Dr. Francis Lieber's Instructions for the Government of Armies in the Field. Appointed during the Civil War (in December 1862) a member of a board to propose amendments or changes in the rules and articles of war, the responsibility fell mainly upon Dr. Lieber for the preparation of an instruction on the rules and usages of war. The difficulty of his task may be inferred from a passage in a letter written by him to General Halleck on February 20, 1863: "You,

[1] "The example of the United States initiated the present practice, according to which it is the duty of neutrals to prevent the fitting out and arming on their territory of cruisers for belligerents, to prevent enlistment on their territory for belligerents, and the like."—2 Oppenheim, *International Law* (2nd ed.) 358.

[2] See especially s. 8 of the British Act of 1870 in regard to the fitting out of ships of war. Under the old British and American Acts, an essential element of the offence was the *intent* of the accused that the ship should be employed in the service of the belligerent. S. 8 of the British amendment of 1870 provided the alternative of "having reasonable cause to believe" that the ship would be employed, etc. In Fenwick, *The Neutrality Laws of the United States* (1913), p. 135, it was pointed out that the existing American legislation was inadequate to cover the larger obligation assumed under Art. 8 of the 13th Hague Convention (1907). Art. 3 of the Act of Congress of June 15, 1917, is framed in the alternative of intent that the vessel shall be employed, etc., and reasonable cause to believe that it will be thus employed.

[3] "We cannot too distinctly detach ourselves from the European system, which is essentially belligerent, nor too sedulously cultivate an American system, essentially pacific."—Jefferson to President Madison, March 23, 1815, cited in 5 Moore Dig. 310.

well read in the literature of this branch of international law, know that nothing of the kind exists in any language. I had no guide, no ground-work, no text-book. I can assure you, as a friend, that no counsellor of Justinian sat down to his task of the Digest with a deeper feeling of the gravity of his labour, than filled my breast in the laying down for the first time such a code, where nearly everything was floating. Usage, history, reason, and conscientiousness, a sincere love of truth, justice, and civilisation have been my guides; but of course the whole must be still very imperfect." [1] The code thus prepared was adopted with slight changes and was issued as General Orders No. 100, Adjutant-General's Office, of 1863. It was again issued, without modification, for the government of the United States armies in the war with Spain, in 1898.[2] In the preface to the Rules of Land Warfare, issued by the United States War Department on April 25, 1914, it is stated that everything vital in General Orders 100 of 1863 had been incorporated into the Rules, and the original text had been retained wherever practicable.

Dr. Lieber's code is also the direct predecessor of the Hague Conventions of 1899 and 1907 in regard to the laws of war on land, for the Conference of Brussels in 1874 based its labours upon it,[3] and the work of the latter was the basis for the discussions at the Hague in 1899.[4] The statement may be ventured that Dr. Lieber's code has been more fortunate than its descendants, for it has served —and has been observed—in two wars; while the Brussels Declaration was never ratified, and the Hague Conventon has not been complied with. A reason for this distinction may be suggested. Dr. Lieber's rules were compiled and put in force in time of actual war; they were intended to deal with and regulate an existing situation. The others were framed in time of peace, and were more general in character and statement; perhaps they attempted too much.

The foregoing offer instances only (though they include some of the most striking ones) of American influence on international law through the action of the judicial, the executive, and the legislative departments of government. Mention should also be made of the

[1] Cited in 1 *American Journal of International Law*, 20.
[2] Davis, *Elements of International Law*, Appendix A.
[3] 1 *American Journal of International Law*, 22.
[4] 2 Oppenheim, *International Law* (2nd ed.) 80.

writings by American authors on international law. Among those now deceased stands out the work of Wheaton, especially the edition with Dana's notes.[1] The list of writers still living who have ably contributed to the fund of knowledge on the subject is long; but one cannot forbear to note the work of Professor John Bassett Moore, especially his *Digest of International Law*. To trace the influence of these writers requires more space than this article affords.

An examination of the instances noted herein shows that the American Government has been guided by certain principles, such as to embody the rules of international law in its system of jurisprudence; to admit the people, through their representatives, to a share in the making of treaties; to recognise the demands of changing social conditions by abandoning the narrow doctrine of perpetual allegiance and establishing the doctrine of the right of expatriation; by encouraging, through precept and practice, the peaceful settlement of international disputes, and by offering an example within the Union of the judicial settlement of such controversies; by a definition of and adherence to the principles of neutrality in advance of the general opinion of the time at a period in the history of the country when weakness might have deterred it from venturing so much; by regulating the conduct of its armies in the field, before other nations had undertaken the task, under conditions which peculiarly arouse the passions, namely, those of civil war.

In the light of these facts, it seems not too much to say that the United States has taken advantage of the unusual opportunities offered it, and that it has led in many instances in the task of a liberal and independent development of international law.

[1] In *The Roumanian*, [1915] P. 6, 40, the President of the Probate Division (sitting in prize) cited in full Dana's note 171 (on the distinction between enemy's property at sea and on land) to Wheaton. And in *The Miramichi*, pp. 71, 81 of the same volume, the President again cited the note in full.

THE DISCIPLINE OF THE NAVAL FORCES OF THE DOMINIONS.

[*Contributed by* Sir R. B. D. Acland, K.C.]

The gradual growth of the co-operation of the Dominions in the naval defence of the Empire will some day form a most interesting chapter in the history of the Empire; but this is not the time or place to attempt to write it. The object of this paper is to show what steps have been taken to provide for the discipline of the naval forces of the Dominions, a matter of absolutely vital importance. The enforcement of discipline in a fighting force means far more than securing the correct and orderly behaviour of the members of any particular unit, be it ship or squadron, regiment or brigade. It involves securing the due subordination of all ranks in all circumstances to their immediate and ultimate superiors.

To effect this in a composite force would be difficult enough, and this difficulty is enormously increased when there are one supreme and several subordinate legislatures, each claiming full legislative power within their territories and when the force is from its very nature mobile and may within quite short periods of time be in different parts of the world.

The Colonial Naval Defence Act.—In 1865—three years after the House of Commons had resolved that Colonies exercising the right of self-government ought to assist in their own defence—the Colonial Naval Defence Act (28 & 29 Vict. c. 14) was passed.

By s. 3 it empowered the proper legislative authority of a Colony with the approval of His Majesty in Council to make provision for providing ships, officers, and crews; for raising a body of volunteers bound to serve in the Royal Navy on emergency; for enforcing good order and discipline among the officers and men while ashore or afloat within the limits of the Colony; and for making the officers and men while ashore or afloat within the limits of the Colony or

elsewhere subject to all the enactments and regulations for the time being in force for the discipline of the Royal Navy.

By s. 4 the volunteers were to form part of the Royal Naval Reserve, but except as in the Act expressly provided should be subject exclusively to the provisions made by the proper legislative authority of the Colony. S. 6 enabled His Majesty to accept the offer of any Colony to place at his disposal any vessel of war and her crew, and if the offer was accepted the vessel was to be deemed to all intents a vessel of war of the Royal Navy and the officers and men serving therein were to be deemed to all intents officers and men of the Royal Navy and subject to all enactments and regulations for the time being in force for the discipline of the Royal Navy.

S. 7 enabled His Majesty to accept the services of any officers and men of the volunteers for general service in the Royal Navy, and if the offer was accepted the provisions of the Act of 1859 relating to men of the Royal Naval Reserve called into actual service were to apply to the volunteers.

S. 15 of the Act of 1859 provided that all the laws and customs for the time being in force for the government of His Majesty's ships, vessels, and forces by sea and applicable to any person in or belonging to the Fleet or to any person being in actual service and full pay and part of the crew of any of His Majesty's ships or vessels should be applicable to every volunteer while he was afloat or otherwise under training and during such time as he should be "in actual service," which means when the Royal Naval Reserve is called out.

The effect of the Colonial Naval Defence Act was that, while the local government had absolute control of the discipline when the vessels and men were within the limits of the Colony, if they passed outside those limits or were placed at the disposal of His Majesty they became subject to the Naval Discipline Act. This meant that in these circumstances the Colony lost all real control over them, for all powers of enforcing discipline by court-martial or otherwise, all powers of providing for the execution of punishment inflicted, and all the administrative powers necessary for the effective working of the Act were centred in the Admiralty alone, there being no power to modify outside the Colony the provisions of the Naval Discipline Act or to vest in the colonial authority any of the administrative powers conferred on the Admiralty.

The Naval Forces Act.—In 1903 the Naval Forces Act (3 Ed. VII. c. 6) was passed. It enabled the Admiralty to raise a Royal Naval Volunteer Reserve and by s. 1 (2) enacted that the Act of 1859 as amended by subsequent enactments should (with certain exceptions not material to the question of discipline) apply to the force when raised.

The Colonial Naval Defence Amendment Act.—The Colonial Naval Defence Act was amended in 1909 by 9 Ed. VII. c. 19. By this Act the proper legislative authority of the Colony was authorised to provide that any volunteers raised under the powers of the Act of 1865 should form part of the Royal Naval Volunteer Reserve. Ss. 4 and 7 of the Act were amended to apply to such volunteers. By s. 2 power was given for the proper legislative authority to provide that any seaman and others raised and maintained under the Act of 1865 and entered on the terms of being bound to serve as ordered in any vessel provided by the Government of the Colony should also be bound to general service in the Royal Navy in emergency. S. 7 of the Act of 1865 was amended to apply to these men also—a unique example, so far as the writer is aware, of two readings of a section of a principal Act being provided by an amending Act.

The difference between the two classes of volunteers with regard to discipline is in substance that the former class would be subject to the Naval Discipline Act only when training or in actual service, while the latter class are, as soon as their services have been accepted, to all intents officers and men of the Royal Navy and subject to all enactments and regulations for the time being in force for the discipline of the Royal Navy.

Up to this time the legislation was based on the idea of small local forces for strictly colonial purposes, subject to such discipline as the local legislatures thought proper unless they placed their forces at the disposal of the central government, in which case they became subject to the disciplinary code of the Royal Navy.

The foregoing account of the Imperial legislation has been necessary in order to understand the action and legislation of those Dominions which have maritime interests and to appreciate the problem which presented itself when the desire of some of the Dominions to have real ocean-going navies was manifested and acceded to.

Australia.—The Australian Colonies established some small

defence forces under the Act of 1865, in which commissions were granted by the Governors. After the Commonwealth Constitution Act was passed in 1900 the Defence Act, 1903 (No. 20 of 1903), was enacted. S. 8 enabled the Governor-General to grant commissions in the Defence Force. S. 56 provided as follows: "The naval forces shall at all times *while on active service* be subject to the Naval Discipline Act save in so far as it is inconsistent with this Act, but so that the regulations may prescribe that any provision of the Naval Discipline Act shall not apply to the naval forces." "Active service" is defined to mean substantially any naval service in time of war.

S. 124 empowered the Governor-General to "make regulations not inconsistent with this Act . . . which are convenient or necessary to be prescribed for securing the discipline and good government of the Defence Forces . . . and in particular prescribing matters for and in relation to (among other things) the convening, composition, procedure, and powers of courts-martial and courts of inquiry, and the fixing of penalties for breaches of the regulations, but so that no period of imprisonment shall exceed three months and no pecuniary penalty shall exceed £20."

Regulations were made in due course by the Governor-General of which it is not necessary to say more than that within the limit provided by s. 124 they brought into existence a code of punishment very much less severe than that provided by that of the Naval Discipline Act.

S. 102 provides that any member of the Defence Forces charged with any offence against "the Act" (which includes the regulations) may be tried either by court-martial or by a civil court.

It is not necessary to trace the history of the negotiations between the Mother Country and the Colonies which resulted in Australia, the Cape, Natal, and New Zealand making substantial grants towards the cost of the Imperial Navy. Here it is only necessary to say so much as is said of the history to understand the problem relating to naval discipline which arose when the next step was taken.

It is clear that the Mother Country had nothing more than a parental interest in the arrangements which the Colonies made for the discipline of their naval forces so long as they were intended to operate independently and solely in the territorial waters of or in

waters adjacent to the Colony. But the matter would of course present an entirely different aspect if the Dominions were ever to establish fleets of large ocean-going ships, which would necessarily in the course of their voyages meet ships of the Royal Navy, with which they would have no connection beyond the fact that both were His Majesty's ships, and which might enter not merely foreign ports, but ports in other Colonies or in Great Britain or Ireland.

But in course of time this happened. In 1909 a special Imperial Conference was called to consider questions of the naval and military defence of the Empire. One outcome of that Conference was that the natural desire of the Dominions to have navies of their own was recognised and the result has been that the Royal Australian Navy and the Royal Canadian Navy have come into existence.

It was agreed on all hands that it was essential that there should be one common discipline applicable to all the forces in peace and war, but grave questions arose as to how this could be carried out while securing to the Dominions complete administrative control of their own ships. Could a Dominion legislature, whose legislative powers were confined to passing laws for the peace, order, and good government of the Dominion, for the purpose (*inter alia*) of naval defence, pass an Act which would be in force outside the territorial limits of the Colony and authorise the imprisonment of an offender or the execution of a capital sentence outside its own and even within the territorial waters of another Colony or of Great Britain herself? If not, how could the Imperial Naval Discipline Act be made applicable to the Dominion force without seeming to limit the powers of the Dominion legislatures? If this could be done, how could the administrative powers of the Admiralty be transferred to the appropriate Dominion authority without impairing the common discipline? And lastly, how could common action as well as common discipline be best secured in time of war?

The Naval Discipline (Dominion Forces) Act.—To meet these difficulties the Naval Discipline (Dominion Naval Forces) Act, 1911, was passed. It carefully avoided raising the first question, and left the initiative entirely to the Dominion. It made provision for the Admiralty's powers being transferred at the will of the Dominions to the appropriate authority and provided for the case of war. It is submitted that the result is that when the Act is adopted by a Dominion, either by virtue of the Imperial legislation or by virtue

of that of the Dominion the Imperial Naval Discipline Act (modified or not as the case may be) is in force at all times and in all places on ships provided by the Dominions.

S. 1 runs as follows:

Where in any self-governing Dominion provision has been made (either before or after the passing of this Act) for the application to the naval forces raised by the Dominion of the Naval Discipline Act, 1866, as amended by any subsequent enactment, that Act as so amended shall have effect as if references therein to His Majesty's Navy and His Majesty's ships included the forces of ships provided by the Dominion, subject however:

(*a*) in the application of the said Act to the forces and ships raised and provided by the Dominion and the trial by court-martial of officers and men belonging to those forces to such modifications and adaptations (if any) as may have been made or may be made by the law of the Dominion to adapt the Act to the circumstances of the Dominion, including such adaptations as may be made for the purposes of authorising or requiring anything which under the said Act is to be done by or to the Admiralty or the Secretary of the Admiralty, to be done by or to the Governor-General or by or to such person as may be vested with the authority by the Governor-General in Council, and

(*b*) in the application of the said Act to the forces and ships of His Majesty's Navy not raised and provided by self-governing Dominions to such modifications and adaptations as may be made by His Majesty in Council for the purpose of regulating the relations of the last-mentioned forces and ships to the forces and ships raised and provided by the self-governing Dominions or any of them.

Provided that where any forces or ships raised or provided by a self-governing Dominion have been placed at the disposal of the Admiralty the said Act shall apply without any such modifications or adaptations as aforesaid.

By sub-section (2) provision is made that the Act shall not come into force with regard to the forces and ships of any Dominion until provision to that effect has been made in the Dominion.

It is hoped that this Act has provided the means of securing a common discipline throughout all the naval services of the Empire without impairing the administrative independence of any Dominion and at the same time by the effect of the proviso to sub-sect. 1 to secure the central control of the Admiralty where the Dominion has chosen to place its ships at the disposal of the

Admiralty, a matter absolutely in the discretion of the Dominion Government.

Commonwealth Defence Act.—The Commonwealth Defence Act, 1910–12, carries out the scheme. It is a composite Act made up of the Naval Defence Act, 1910 (No. 30 of 1910), the Naval Defence Act, 1911 (No. 16 of 1911), the Naval Defence Act, 1912 (No. 21 of 1912). By s. 36 the Naval Discipline Act and the Naval Discipline (Dominion Naval Forces) Act, 1911, and the King's Regulations and Admiralty instructions for the time being in force in relation to the King's naval forces are subject to any modifications and adaptations prescribed by the regulations made applicable to the naval forces. By s. 44(*a*) provision is made for the officers of the King's naval forces, of the Commonwealth naval forces, and of the naval forces of any part of the King's Dominions being eligible for appointment as officers to constitute naval courts-martial.

One further step was required to complete the plan. By the Naval Defence Act, 1910–12, s. 8, the Governor-General was empowered to commission officers. But such a commission of course gave them no position or right of command in relation to officers or men of the Royal Navy or of the naval forces of other Dominions. Accordingly an order of His Majesty in Council of February 14, 1914, authorised the Admiralty to issue commissions for service in His Majesty's Fleet as thereinafter defined to any officers of the Royal Navy, and in like manner the Governor-General for the Commonwealth of Australia was authorised to issue similar commissions to officers of the Royal Australian Navy. The expression "Service in His Majesty's Fleet" in all future commissions was declared to include service in the Royal Navy and the Royal Australian Navy, and it was further provided that all commissions already issued either by the Admiralty or in accordance with the law in force in the Commonwealth should be deemed to have been issued "for service in His Majesty's Fleet" as above defined.

The scheme was now complete, but the final working out of it has been delayed by the war, at the commencement of which the Commonwealth Government immediately placed all their ships and forces at the disposal of the Admiralty and consequently the Naval Discipline Act without modification applied to them, the officers, by virtue of the Order in Council above referred to, taking rank and

command according to their seniority in their rank in the Royal Navy and Royal Australian Navy.

The necessary modifications are under consideration by the Commonwealth Government and consist in the main of substituting the Governor-General or the Naval Board for the Admiralty.

The position in regard to the Australian naval forces has been dealt with at length because that Dominion has advanced further than any other in this matter. It may be hoped that the other Dominions which establish effective naval forces will follow the same lines and then in time of war there will be one Fleet of His Majesty governed by one disciplinary code, while in time of peace their systems of discipline will be identical, though for purposes of administration and movement they will be independent.

New Zealand.—Up to the year 1913 New Zealand had not established any naval force of its own. The Government had made large contributions to the cost of the Royal Naval Force employed in that part of the world and had presented a ship to the Royal Navy. But more recently this Dominion has laid the legislative foundations for a Navy.

In 1913 the Naval Defence Act, 1913 (1913, No. 45), was passed. By it the Governor was empowered to raise, maintain, and organise such permanent naval force as he deemed necessary.

He can commission officers, but, so far, the common form of commission for service in His Majesty's Fleet has not been adopted.

The naval forces may for the purpose of training or service be placed on any ship of the King's Navy or in any naval training establishment or school in connection with such Navy, and while so placed shall be under the command of the officer commanding and be subject to the laws and regulations to which members of the King's naval forces in a like position are subject.

The "Naval Discipline Acts," which expression includes the Naval Discipline Act, 1866, and the amendments thereof and the Imperial Act called the Naval Discipline (Dominion Naval Forces) Act, 1911, is, subject to the New Zealand Act and to any modifications prescribed by the regulations, applied to the New Zealand naval forces.

By s. 20 large powers of transfer to the Royal Navy or to the navies of any other part of the British Dominions are given, and the forces when transferred are (subject to the conditions of transfer)

subject to the laws and regulations governing the King's naval forces or the naval forces of the part of the British Dominions to which they are transferred so far as the laws and regulations are applicable.

S. 24 provides for officers of the King's naval forces, of the New Zealand naval forces, and of the naval forces of any other part of the British Dominions being eligible for appointment as officers to constitute courts-martial.

Power is given to the Governor by s. 25 to make regulations not inconsistent with the Act for securing the discipline and good government of the naval forces and the discipline of persons receiving instruction in training establishments, and in particular prescribing matters for or in relation to (1) the good government of naval establishments and (2) the discipline of persons receiving instruction or training in or employed in or in connection with any naval establishment. The regulations may provide penalties for breaches thereof not exceeding imprisonment for three months in the case of imprisonment or a fine of £20 in the case of pecuniary penalties.

Up to the present time no great use has been made of the powers conferred by this Act. A small vessel was handed over to the New Zealand Government and a training establishment opened. But the war, here as elsewhere, prevented further development, and on August 3, 1914, the ship and those in training were placed at the disposal of the Imperial Government.

The other Dominions have proceeded on different lines.

Canada.—Canada in 1910 passed its Naval Service Act, 9–10 Ed. VII. c. 43, by s. 11 of which the Governor in Council was empowered to organise and maintain a permanent naval force and a volunteer force which are included in the term "naval service." By s. 23 in case of emergency he may place at the disposal of His Majesty for general service in the Royal Navy the naval service or any part thereof, any ships or vessels of the naval service and the officers and seamen serving in such ships or vessels, or any officers or seamen belonging to the naval service.

By s. 45 the Governor-General in Council may make regulations for the discipline of the naval service.

S. 48 applies the Naval Discipline Act and the King's Regulations and Admiralty instructions to the naval service in so far as

they are applicable " and except in so far as they may be inconsistent with this Act or with any regulations made under this Act," and provides that where any duty is imposed on or power vested in the Admiralty or any other body or officers and there is no such body or officer in Canada or in the naval service, the Governor-General in Council may direct who shall exercise or perform such power or duty in Canada or in the naval service.

It will be observed that this Act is on the lines suggested by the Colonial Naval Defence Act, 1865. Nothing has been done, so far as the writer is aware, to bring into operation the Naval Discipline (Dominion Naval Forces) Act, 1911, and commissions issued by the Governor-General in Council are not effective in His Majesty's Fleet as defined in the Order in Council.

It is submitted that it is open to some doubt how far the Act is in force outside the territorial waters of the Dominion.

Natal and the Cape have proceeded on different lines. They have not yet attempted to do anything in the way of forming a fleet but have raised bodies of naval volunteers.

Natal.—By the Naval Volunteers Act, 1907, the Governor of Natal was authorised to form a division of the Royal Naval Volunteer Reserve established under the Imperial statute of 1902 and to serve in the Royal Navy within and beyond the territorial limits of the Colony and either ashore or afloat, and to be liable when on actual service or when being temporarily borne on the books of any of His Majesty's ships and vessels for instruction, training, or exercise afloat or ashore, to all and several the provisions of any Imperial statutes relating to naval discipline for the time being in force and to be subject to such regulations and conditions as may from time to time be made and imposed by the Admiralty acting under the authority of the Imperial legislature, or by the Governor under powers assigned to him by His Majesty in Council under the like authority, in respect of (*inter alia*) discipline, offences, and punishments in so far as they are not provided for by any Imperial statute relating to naval discipline.

There is a proviso that if any volunteer is sentenced under the Naval Discipline Act or regulations to a term of penal servitude or imprisonment exceeding six months to be served outside the territorial limits of the South African Colonies, he may if he so desires be transferred so soon as a proper opportunity offers to one of the

gaols or convict stations, as the case may be, in the Colony of Natal.

Cape of Good Hope.—In 1908 the Cape Parliament passed an Act to enable the Governor to enrol a force of naval volunteers in terms (*mutatis mutandis*), so far as the matter of discipline is concerned, substantially identical with those of s. 1 of the Natal Act.

It is interesting to note that the Natal and the Cape Acts were both passed before the Imperial Act of 1909, and it might well have been open to doubt how far the provisions of those Acts which purported to make the volunteers part of the Royal Naval Volunteer Reserve were effective.

The point, however, seems to have been noticed, for by subsect. (2) of s. 1 of the Act of 1909 it was enacted that where any such legislative authority had made provision for the volunteers raised under the Colonial Naval Defence Act being part of the Royal Naval Volunteer Reserve before the passing of the Act, "the colonial enactment by which such provision is made shall have effect as if this Act had been in force at the time of the passing of the colonial enactment."

Newfoundland.—The only other naval force within the Empire is the Newfoundland division of the Royal Naval Reserve. It is not strictly a colonial force at all, but is raised under the provisions of the Act of 1859, which by successive amendments in 1896 and 1902 authorised the enrolment of seamen or others specially suitable within or without the British Islands if they were British subjects. They are of course subject to the Imperial legislation.

There are in most Colonies small forces for police purposes and the like such as the Newfoundland and Canadian fishery and hydrographic services; but they are in no sense military forces, and the question of their discipline does not come within the purview of this paper.

INTERNATIONAL INTERFERENCE IN AFRICAN AFFAIRS.

[*Contributed by* Sir H. H. Johnston, G.C.M.G.]

In 1883–4, the effects of Cameron's and Stanley's journeys across Africa between 1875 and 1883 made themselves felt very acutely in an intense international jealousy over the acquisition of African dominion by European States. The main parties in the discussion in 1883 were *Great Britain*, which had been an "African" power since the seventeenth century (and a State actively trading with Africa a hundred years earlier); *France*, her keen rival in colonial expansion; and *Portugal*, the *doyen* of pioneering nations and the first Christian state to discover the geography of Tropical Africa and enter into relationships of commerce and rule with the Negro peoples.

A feeling of jealousy and bitter rivalry between these three great historic peoples in regard to African enterprise had begun to arise less than a hundred years after Portuguese navigators, explorers, military leaders, and missionaries revealed Africa to Europe. It arose from the determination of the Portuguese (enhanced when Spain assumed the crown of Portugal) to keep the African trade entirely to themselves. Even when the English, French, and Portuguese nations were at peace and in amity in Europe, their seamen and merchants were scuffling and shooting, pirating, and imprisoning their rivals in the gold, pepper, and slave trades on the West Africa Coast. The Slave Trade of the seventeenth and eighteenth centuries enhanced the value of Negro Africa in the estimation of the Western Powers, and brought in another competitor, Holland. The Dutch became quite a considerable African Power in the eighteenth century. In the seventeenth they had taken the place of the Portuguese in Senegal, and on the Gold Coast, in Angola, in Moçambique, and had founded their famous

Chartered Company of the East Indies which colonised the southernmost extremity of Africa.

The first quarter of the nineteenth century saw Holland displaced as a ruling Power in South Africa by the British, though still governing important sections of the Gold Coast. But the cessation of the Slave Trade robbed Tropical Africa of much of its interest in the eyes of Europe. The permissible trade in gold dust, palm oil, and ivory with the Gold Coast was so negligible at the beginning of the second half of the nineteenth century that the Dutch Government, finding itself constantly involved in native squabbles and in disputes with Great Britain over its Gold Coast settlements and Protectorates, willingly ceded them all to the British Government in exchange for substantial equivalents in the East Indies. So that by 1875, when a renewal of interest in Africa had been awakened by Stanley and Cameron and by the death of Livingstone, Holland, to her secret regret, was without a foothold in the Dark Continent: Great Britain, France, and Portugal were the only European Powers ruling in Africa (for Spain with her Morocco presidios and Fernando Po hardly counted, and Turkey was mainly Asiatic and North African).

To the Dutch discontent with this arrangement may be traced in part the spring of several international movements which were to aim at neutralising and limiting this West European monopoly of African enterprise. Dutch adventurers—I use the word without any disagreeable signification—interested themselves in the raw young Boer republics of South Africa. Vigorous Dutch trading companies were founded at the mouth of the Congo, in Liberia, on the coast of Moçambique and Angola.

About the middle of the 'seventies, palm oil began to tell as a motive for increased commercial and political influence on the African coast. The oil of the husk of the nut and of its kernel was proving itself supremely useful as a first-class lubricant and a material for candle and soap manufacture. Diamonds had been discovered in the most hopeless deserts of South Africa; the gold output of the Gold Coast was improving and British, Dutch, and German explorers were beginning to declare inner South Africa auriferous.

The African Empire of France.—France after her 1871 bereavement was throwing her renewed energies not into reconquering

Alsace-Lorraine, but into the creation of a vast African empire, because Marseilles and Bordeaux were beginning to thrive on a well-protected African commerce. France proposed indeed not only to turn Africa to account, but to do so in the old seventeenth-century fashion—entirely selfishly: French Africa was to be reserved for exploitation by French merchants and industrials only, and its exports were—as far as possible—to be sent to French ports. Great Britain sought to console herself for this limitation of her trade with Africa by enlarging the British spheres in Africa. This in its turn brought us up against the ancient claims of Portugal, tolerably well founded, but having lapsed through the decay of Portugal as a colonising Power.

The Intervention of Germany.—Nevertheless by dint of diplomacy and a preference for the settlement of disputes by compromise rather than by violent insistence the three Western Powers were in process of bringing nearly all the African continent under their tripartite jurisdiction in the early 'eighties, when another factor made itself felt: Germany. The Hamburg and Bremen trade with East, West, and South Africa had grown very considerably between 1860 and 1884, the year in which Germany took the first overt steps to show that she did not intend this New Continent to be divided between Britain, France, and Portugal. Great Britain, it is true, was at that time obstinately bent on Free Trade and abhorrent of differential duties in her colonial dominions, but France and Portugal were carrying Protectionism to an extreme, and had already invented the fact of "differential duties" as well as the phrase. In 1883, official as well as commercial Germany must have made up its mind to take a part in the political exploitation of Africa.

Between 1700 and 1865, adventurous Germans played a great part as pioneers in creating the British Empire. The link between Hanover and Britain led many a German to conceive that in furthering the British dominion over Canada, Africa, Australasia, and India he was in a way opening up paths for German enterprise to follow. It is quite conceivable that but for the rise of antagonistic Prussia, Protestant Germany might have gravitated towards Protestant England and Protestant North America, and the three mightiest divisions of the Teutonic peoples have attained virtual unity and a common outlook on the exploitable regions of the

Tropics and the other waste places of the earth. But after the successes of Prussia against Austria and Denmark, and most of all against France in 1870, a separate future for Imperial Germany was decided on by the Hohenzollern House. To commence with, Germany rather toyed with Internationalism in opening up Tropical Africa. She did not feel herself—having no navy—quite able to start as a colonial Power and enter into immediate rivalry with Britain and France.

Internationalism in Africa really arose with the conquest of the Sudan by the Macedonian dynasty in modern Egypt. Though at first princes of Muhammad Ali's family took command, the Pashas or Khedives of Egypt soon came to rely on Prussians, Frenchmen, Englishmen, Americans, Italians, Swiss, Dutch, Belgians, Austrians, and Greeks for the pioneer work of discovery, conquest, and rude administration. The general outcome of the Khedivial rule over North-east Africa was not very satisfactory. It was more or less a tyranny for exploiting the Sudan for the benefit of Egypt and Turkey.

The Belgian Congo.—But the somewhat idealised picture drawn by British and German explorers or press correspondents of Gordon's, Baker's, or Emin Pasha's administration probably inspired both King Leopold of Belgium and the African explorers of Germany with the idea of founding a great International State in the basin of the Congo. Cameron and Stanley created the impetus by their discoveries. The King of the Belgians put himself at the head of Internationalism in 1875–6, with some philanthropic support from Great Britain, and later with much support from Germany, from Dutch firms trading with Africa, and from French Catholic missionaries. But his International Association soon split up into National Committees, the better to carry out purely national ambitions. The French Committee generated De Brazza, and created French Congo and French Nigeria. The British Committee laid the foundations of British East Africa and made an attempt to Britannicise the dominions of the Sultan of Zanzibar. The German interest in the scheme ranked itself almost entirely with King Leopold's enterprises. These had commenced (under a Belgian Committee) by a plucky but not very successful attempt to introduce law and order under Belgian officers into the Tanganyika region, then constantly ravaged by Arab slave-raiders. But in 1879, on

Stanley's return from discovering the course of the Congo, King Leopold created a special "international" committee to continue Stanley's efforts to open up the Congo Basin to European commerce and peaceful intercourse.[1] Numerous adventurous Germans entered King Leopold's service, and their discoveries throughout the southern half of the Congo basin at least equalled in importance those of Stanley and Grenfell to the north, and of De Brazza and Crampel to the north-west.

So that by the latter part of 1883 there had arisen a new African Power, which was to dispute the right of Britain, France, and Portugal to settle the fate of Africa without any further consultation of the world.

Meantime it had occurred to Sir Robert Morier, Sir Charles Dilke, Lord Fitzmaurice, and Sir Henry Austin Lee that the enterprise of King Leopold was taking an ominous turn, and that to counteract the internationalising of Africa it might be preferable to come to terms with Portugal in order to checkmate France, on the one hand, and, on the other, the Unknown Power that lay behind King Leopold. Hitherto we had (and France had, as early as the eighteenth century) persistently refused to recognise Portugal as the ruler of the Congo or to allow her by coast occupation to control the mouth of the Congo. The original motive for this firm decision was an unblushing desire to have free access to the Congo estuary as a slave market. When the reversal came in British policy, we next objected to a revival of Portuguese suzerainty over Western Congoland from the fear that the Portuguese would restore the slave trade there to feed Brazil and the Southern States of North America. In the 'seventies we objected to the protectionist policy of Portugal and feared that if she became mistress of the Lower Congo she would lock up the commerce of that region. But in the doubt and uneasiness as to what lay behind King Leopold's International State, our politicians of 1883 devised a scheme of

[1] There is no reason whatever to suppose that King Leopold had any special thought of gain or enrichment in initiating this Congo enterprise. His first Belgian associates like de Wauters and Colonel Strauch were enthusiastic philanthropists, who sought to create a huge "Liberia," an ideal Negro State in the Congo Basin. It was not until 1890 that the King's policy began to turn definitely towards personal gain and not until 1892 (after the ratifications of the Brussels Act) that he commenced the creation of those concessionnaire companies and his own personal monopolies which eventually made the Berlin Act a dead letter.

recognising Portugal as the mistress of Congo destinies, subject to very important stipulations of freedom of trade and freedom of religion.

The Treaty of 1884 with Portugal.—The result was the 1884 Treaty with Portugal, which was very favourable to Great Britain as an African Power. It proposed to substitute a British for a Portuguese Protectorate over Dahomé, and secured for Great Britain the right to purchase Delagoa Bay.

This Treaty might have been ratified and have actually been accepted by unheeding Europe under protest, since the area of the French ambitions was not directly affected. But it would of course have reduced King Leopold's enterprise to futility. Yet its ratification was refused by a House of Commons inflamed chiefly by Jacob Bright's objections to Portugal as a Roman Catholic Power likely to be obstructive to British Protestant missions already beginning their work on the Congo under Stanley's encouragement. Stanley himself vehemently attacked the Treaty because he believed at that time he was working for a vague kind of British Protectorate over the Congo Basin. King Leopold, however, was spending his money and laying his plans for nothing but an International State with great openings in it for Belgian commerce. He was quite willing at first to have Englishmen as governors or employees, but more with the idea of their being stopgaps until Belgians were inured to African administration. I am sure at that period—1883–4—he was far from contemplating the monstrous monopolies and the rubber and ivory policies of the 'nineties and the opening years of the twentieth century. A Portuguese domination over the Congo estuary would reduce his enterprise to futility.

He accordingly stirred up Germany, now very eager to play a part in African politics; and aroused the jealousy of France. Consequently before the British Government could make any further attempt to obtain national sanction for the Anglo-Portuguese Treaty, Germany approached France, and the two Powers summoned a conference to Berlin which should discuss from an international point of view the disposal of the vast Congo Basin, " the regulation of the conditions most favourable to the development of trade and civilisation " in this central region of Africa (extending beyond the Congo watershed to include Lake Nyasa and the Shiré river) " and the assurance to all nations of the advantage of free navigation on

the two chief rivers of Africa flowing into the Atlantic Ocean." Also, " the . . . furthering of the moral and material well-being of the native populations."

The British Government of the day accepted the situation and the invitation, no doubt with the *sous-entendu* that while we abandoned the Anglo-Franco-Portuguese hegemony of the Dark Continent, and any British aspiration to a share in that, Congo Basin which British subjects had been the main agents in discovering, British rights to found a protectorate over Eastern Nigeria were to receive recognition at this Conference.

The Berlin Conference.—The Berlin Conference was attended by all the first and all the (then) second-class Powers of Europe, and by delegates of the United States; that is to say, by the representatives of nations that were or aspired to be rulers in Africa, and by others that had no foothold on that continent, but were already interested in the African trade. Though perhaps not expressed in published words at the time, the presence of Danish, Dutch, Swedish, Russian, and Austro-Hungarian delegates at the Conference was an intimation that the fate of Africa concerned the civilised world in general, and not merely the Western Powers and Turkey. It was therefore an important landmark in history, though it was less the conscious expression of Scandinavian or American sentiment than the inspiration of commercial Germany, now firmly determined not to be shut out by tariffs or privileges, charters or concessions, from full access to the African markets.

The Terms of the Act of 1885.—The General Act of the Berlin Conference provided for the complete freedom of navigation of the Congo and Niger and their affluents; of Lakes Tanganyika and Nyasa and the Shiré river; for complete freedom of trade throughout the Congo Basin, complete freedom of religion and encouragement of the missionaries of religion or science " without distinction of creed or nation." Further, the Slave Trade in the Conventional Basin of the Congo was to be extirpated by the Powers that governed that region, and this region of equatorial Africa was to be considered neutral territory in the event of international war. Navigation dues might be levied on the Congo or the Niger, but with no differential character either towards individual interests or nationality; and these dues might only be such as were necessary to meet the expense of ensuring the navigability of waterways. The same

provisions applied to roads, railways, and canals. Merchandise imported into the Congo Basin was to remain free of import and transit dues, but "wares" imported might be subjected to such taxes as might fairly be levied as compensation for expenditure in the interest of trade. [I quote from the English version of the Act; what was the equivalent of "wares" in diplomatic French I cannot say, or how diplomatists could discriminate between imported "wares" and imported merchandise.]

It was soon found that these counsels of perfection were unworkable. Europe and America (the United States did not ratify the Berlin Act) were not prepared to find the funds philanthropically for the economic development of the Congo Basin, for the suppression of the Arab Slave Trade, for the substitution of railways, steamers, and traction generally for that hateful system of human porterage which was then and is still the bane of Tropical Africa and the origin of the trade in slaves. So that it became necessary five years afterwards to summon another Conference (at Brussels) to amend and extend the provisions of the Berlin Act, to permit of import duties being levied, the admission of arms and alcohol being controlled or inhibited, and the Slave Trade being completely put an end to. The invitations to this International Conference (wider in the selection of conferring nationalities) issued from the King of the Belgians "in concert with the Sovereign of Great Britain." The General Act of the Conference (which in most of its provisions covered a much greater area than the Conventional Basin of the Congo; one which extended across Africa *from the 22nd parallel of South latitude to the 20th parallel of North latitude*) was followed by a Declaration of the Powers adhering to the Berlin Act that Art. 4 of the Berlin Act (forbidding the levying of import duties) was abrogated in favour of the right to levy import duties not exceeding 10 per cent. *ad valorem*. [Nothing had been stipulated in the Berlin Act regarding *export* duties, and these therefore have been imposed according to the will of the governing Power ruling over any portion of the Conventional Congo Basin.]

The Rivalry of the European States.—Although the Berlin Act signalised the first recognition of international rights and safeguards in the development of Africa, its ratification was followed by an orgy of jealous nationalism. France came to terms with King

Leopold, with Britain, with Germany, Spain, and eventually with Italy and Portugal in order to secure for the French Republic a vast protectionist Empire, stretching from Tunis and Algeria to Senegal, the Ivory Coast, Dahomé, the southern Cameroons and the Western Congo, the Mubangi-Wele-Mbomu, and Lake Chad ; besides the whole of Madagascar (the foreign trade of which was almost extinguished), the Komoro Islands, and a portion of Somaliland verging on Abyssinia. Great Britain by means of chartered companies and direct annexations or proclamations of Protectorates became an African Power of almost equal magnitude with France—perhaps now exceeding France in area of controlled territories. Portugal gained much by the definition of her " rights "—sentimental and historical rather than admitted claims recognised by modern native potentates. Germany had thrown herself into this exciting game of founding an African empire, while still negotiating for the internationalisation of the Congo Basin. The King of the Belgians, though self-declared " Roi-Souverain of the Congo State " (a title based on no treaty with any native potentate), worked unceasingly to turn his internationalised territory into a Belgian possession, and at last succeeded. Italy not unnaturally strove to develop the commerce of eastern Somaliland and the Red Sea coastlands purely in the commercial interests of Italy ; Portugal persisted in the differential treatment in favour of Portuguese commerce ; and although Britain maintained Free Trade in theory in the regions of Africa governed from London, she did not repudiate differential treatment in her favour from her South African colonies in Transzambezian Africa ; while her chartered companies of the Niger and of South-Central Africa—especially of the Niger—infuriated German or French rivals (as well as fellow countrymen) by their monopolies, their privileged concessions, and—in regard to British Nigeria—their discouragement of the free navigation of Niger waterways.

The Development of the Continent.—The Slave Trade and in general the status of slavery were, however, put an end to, though servile conditions were here and there revived under pleasanter-sounding names. The interior of Nigeria, the whole basin of the Congo, Northern Zambezia, Nyasaland, British and German East Africa were kept free from the alcohol curse, so far as the natives were concerned. Internecine wars between tribe and tribe were stopped. Missionaries circulated almost everywhere except in

certain jealously guarded parts of the Congo Basin, reserved for King Leopold's exploitation; and in portions of Nigeria and the Sudan where it was desired to give no offence to Muhammadan prejudices. Steamers were placed on all the lakes and rivers, railways were constructed both from coast ports to the far interior, and in that interior along unnavigable sections of river courses. Civilised cities arose in the virgin forest or on grassy tablelands where the writer of this article in the middle 'eighties could see from an anthill nothing but vast herds of wild animals, so unaccustomed to the presence of man that they scarcely troubled to avoid him. Rubber and cotton began to be added to the list of African exports, together with tin, phosphates, soda, and monazite, maize, sugar, potatoes, coffee, cocoa, copra, tea, hides, fibres, and timber; while the export of two kinds of oil from the oil palm was increased not merely a hundredfold, but nearly a thousandfold compared to that of mid-nineteenth-century times. Many great fortunes were made out of the mineral and vegetable wealth of Africa in England, France, Belgium, Germany, Holland, and America.

The general result of these twenty years of activity between the calling of the Berlin Conference in 1884 and the inception of the Congo Reform agitation was on the whole advantageous to native—*i.e.* Negro and Negroid—interests. The Arab (or Arabised Negro) Slave Trade and slave raids were absolutely stopped in the Congo Basin, the Sudan, East and West Africa. Similarly the tyranny of the Matebele and Angoni Zulus in South Central Africa; of the Arabs and Hamites of the Nile Valley; of the Fulas and Mandingos, Dahomeans and Azande in West and West Central Africa was completely abated. The devastating germ diseases were taken in hand, and their ravages checked. Peace settled on Africa for the first time in her singularly blood-stained history.

Unsatisfactory Conditions of Government.—But although there set in a period of increased material prosperity for the native under European guidance in Egypt, Tunis, Algeria, in all French West Africa (except French Congo), in the Anglo-Egyptian Sudan, British Nigeria and German Cameroon, Uganda, British East Africa, German East Africa, and in Northern and Southern Rhodesia, some episodes occurred or conditions became established which were discreditable to the Powers that had signed the Berlin and Brussels Acts. Most scandalous were the results of King Leopold's greed in the exploita-

tion of the Congo interior during the rubber boom; not much better conditions prevailed in French Congo under the concessionnaire system; and De Brazza, sent out to investigate and report on the condition of this new French province which he had created, died of a broken heart at the ruinous hatred which had grown up between the natives and their administrators owing to the exactions of the concessionnaire companies. Auguste Chevalier, one of the great scientific explorers of French Africa and a distinguished official, had the courage to write against the devastation wrought by these get-rich-quick adventurers in the regions of the Sanga and the lower Mubangi. The eager development of the cocoa plantations in São Thomé and Principe led to a revival of the slave trade (under the name of indentured labour) in Angola, Portuguese Congo, and Portuguese Guinea. The British South Africa Chartered Company, though it had conferred great benefit on South Central Africa by putting down the tyranny and bloodshed of the Matebele Zulus, obstinately refused (and still refuses) to apportion a fair share of the land in Southern Rhodesia to its native population, especially the long-established agricultural Karaña.

But it was on the abuses of Leopoldian rule in Congoland that far-sighted reformers fixed their attention and concentrated their agitation. I say "far-sighted," because they looked a little farther ahead than the irresponsible American, Anglo-Irish, Belgian, German, French advisers of King Leopold, who were unconsciously acting on the precept: "*Après nous, le Déluge*" . . . "So long as we become excessively rich in a few years out of Congo rubber, what does it matter if our agents on the Congo manifest *trop de zèle* in securing a huge output?" . . . The British, French, Swedish, Swiss, Americans, Belgians, and Italians (most of them ex-officials from Africa or experienced missionaries) who protested against the Leopoldian *régime* in Congoland, realised that if much longer continued, it would lead to a widespread Negro rising against the white man, a rebellion which with climate and germ diseases for its allies would chase white enterprise from Negro Africa eventually. Owing to the vast alliance of the Bantu languages which extends from the Cameroons to Natal, from Southern Somaliland to Cape Colony, from the Wele and the Northern Congo to Damaraland, a fellow-feeling, a unity of thought, expression, and purpose was spreading over all Central Africa, extending even through educated

Negroes to Bechuanaland and the Transvaal, into Nigeria and the Gold Coast.

The Internationalism of the Congo State therefore came to an end in favour of direct Belgian rule. The reform of the Leopoldian *régime* of pitiless exploitation had widespread effects. French Congo was no longer governed antagonistically to native interests: our own native policy in Nigeria, in East Africa, and Uganda was keyed to a higher strain. The Germans, it is true, stopped at nothing in their determination to destroy the Hereró and Hottentot peoples who had stood in the way of their colonising interests in South-West Africa; but they became more considerate of native feelings and claims in the Cameroons and East Africa. (Yet even here their former harshness brought its nemesis in the Great War. Stories of how they had treated the Ova-herero in Damaraland and of severities in the Cameroons and towards the Masai and Wahehe crept from village to village in their possessions; and when war broke out in Europe, not only did no native tribe rebel against British, French, or Belgian rule—even if there were unredressed grievances—but all these Negro peoples united to support their white rulers, and in German territories the native population was, with the exception of the Arabs and one or two warrior tribes, entirely in sympathy with the Allies.)

The Portuguese before the war had already effected noteworthy reforms in their African colonies; and the Belgian Congo—so far from being an object-lesson in stupid cruelty and wasteful rapacity—became almost a type of just and sympathetic African administration to be copied by other Powers.

The Solution of the African Problem.—In fact, on the eve of this ruinous war, it really seemed as though the African problem was being solved on right lines. The French were abating their vehement protectionism. They had emphatically accepted the principle of Free Trade in Morocco, and the tariffs of Algeria, Tunis, and the Ivory Coast were tending towards moderation in their differential duties, foreign capital being more and more attracted to French North Africa. Italy was introducing law, order and real justice for the natives of Tripoli. Egypt under the British ægis was open to the commerce of all the world, without favouritism or restriction; so also the Sudan. The natives of Nigeria, Uganda, East Africa, the Gold Coast, and Sierra Leone were becoming wealthy, industrious,

educated, eager to make the best of life. French West Africa was admirably governed, and the French were preparing to link it up by railway across the desert with Algeria and Morocco. The French had finally extirpated slave raiding and trading in its last stronghold, Wadai. British trade with the German Cameroons and even British enterprise in German East Africa were improving. Nyasaland and Northern Rhodesia were advancing rapidly towards prosperity, alike for Negro people and white commerce and industries. Madagascar was ceasing to remember and idealise the tyrannical Hova Government, and although it still remained virtually closed to all but French commerce, its native peoples were happy, peaceful, and increasing in numbers under French rule. Internationalism of the right kind was quietly growing. The national consciences were becoming more sensitive on questions of right and wrong where the indigenes of Africa were concerned, realising that they were the wards, not the serfs, of Europe. And the Powers that ruled in Africa were more and more inclined to meet and concert plans for the betterment of Africa by international co-operation. In this way they arranged to take common action against germ diseases or to protect a valuable and interesting fauna and flora from extinction or wasteful destruction, to exchange meteorological observations, to link up railways, to join in works of river-navigation improvement.

If Portugal pursued an unwise policy with her *serviçaes* in São Thomé, other and friendly nations politely remonstrated. Swiss or American missionaries pleaded with us to abate the abuse of alcohol in the Gold Coast and Southern Nigeria, and probably induced our Colonial Office to look into the matter. The German and British merchants inveighed ever and again against the tariffs in the Madagascar customs-houses, and yearly France grew nearer to the acceptance of Free Trade and no national discrimination in her African possessions. It really seemed when this war broke out that the problem of Africa was being solved—internationally. A number of nations—even America was represented in the Liberian protectorate—were attempting to civilise, develop, educate, and govern Africa which, with the exception of Abyssinia, was entirely subordinate to them ; each with its national conscience, its national press as court of appeal, its national sense of right and wrong jealously upheld by its national legislature. And the work of the

Berlin and Brussels Conferences was there as the beginning of an international control over the recalcitrant continent, which had so greatly fallen behind Europe, Asia, and America in level of education and well-being. A European, an Asiatic, an American or African people, not represented among the rulers of Africa could appeal to International Acts which at any rate in some degree proclaimed the equality of opportunity for all law-abiding persons in the African markets and industrial enterprises. Africa in fact was becoming opened to world-trade nearly as much as Central and South America ; it was ceasing to be a series of national domains walled round with privileges and prescriptive rights.

The Internationalisation of Africa.—Can this policy of internationalising Africa be revived after the war ? Why not ? Revived, and extended in detail, and strengthened by an immense force of public opinion behind it. Might we not achieve this end along the following lines ? Respect, let us say, the territorial allocation of all Africa to a variety of nations to be governed or controlled much as it now is, until a date too distant for practical politics, when at last each large and small ethnic division of Africa can govern itself in harmony with the general principles of some as yet unborn Federation of Man. Make the national legislatures of each of these countries ruling in Africa realise that their national consciences are held responsible for failure of their tutelage. Allow them a tolerably free hand in the government of Africa between the Tropics, yet expect them to give heed to the recommendations of a great International Council of Advice which shall be established for their guidance and for the expression of world-opinion on African affairs. This Council might work steadily and persuasively for Free Trade throughout Africa, for the rigid control of alcohol, for the extirpation of germ diseases, the protection on scientific lines and for scientific reasons of fauna and flora, the improvement of railway communications, the extension of education, primary and secondary, the fair treatment of all races, and the earnest prosecution of scientific research likely to benefit Africa and the world outside Africa. Under such a Council Great Britain and the Union of South Africa would still continue to govern, protect, or control those regions they already have under their charge, together with such others as a congress of Powers might entrust to them. France, Italy, Portugal, Spain, Belgium, and the United States similarly would continue their present

administration of African countries with or without accretions of responsibility. But while they would not be subjected to the *control* they would be expected to listen to the *advice* of this proposed International Council. If they ignored or refused to follow such advice their national legislatures would expect to learn of very weighty reasons for such an independence of attitude before they endorsed their government's action or inaction.

Proposed International Council.—Such an International Council might consist of delegates (one for each country, with understudies in case of illness) representing each of the Powers of Europe, Asia, and America interested in Africa, either by African administrative responsibilities or simply through commercial enterprise or historic associations. Such represented nations might consist of the United Kingdom of Great Britain and Ireland and its principal daughter nations—Canada, the South African Union, Egypt, India, Australia and New Zealand, and the Confederation of British Tropical America (seven delegates in all) ; France, Morocco, and Tunis ; the United States, Cuba, Liberia; Brazil; Japan; Portugal; Italy; Abyssinia ; Spain ; Germany ; Austria-Hungary ; Rumania ; Belgium ; Switzerland; Holland; Denmark; Norway; Sweden ; Poland ; Greece; Turkey; Palestine (and Jewish interests generally) ; Arabia ; and Persia ; not, after all, many more nations than were represented at the Brussels Conference. In course of time, as civilisation progressed in Africa, those native states that attained to any extensive degree of self-government would be accorded representatives at the Council board. The seat of this International Council might be at Paris, at Rome, or at Lisbon. The languages used at its meetings and in its reports might be English and French. It could be permanently in session and ever watchful to secure the interests of all the world in Africa and the interests and welfare of the gradually segregating and cohering nations of Africa which are slowly but surely being educated for eventual self-government and independence. With this Council might be associated a great Bureau of International Inquiry into all that concerned Africa : its ancient and modern history, its fauna, flora and mineralogy, its diseases and its curative climates, its commerce, its ethnology and languages, religions and educational needs.

Africa is—I believe—the wealthiest of the continents. Its importance to mankind outside Africa doubles every twenty years.

It is still the most backward of the continents and still is the unhealthiest for the never-to-be-rebutted white pioneer. You cannot keep the white man out of Africa now, any more than natural obstacles could have done thirty or ten thousand years ago, at which levels of time there were pioneer white men (to judge from their remains) in Southernmost Africa, or hunting the gigantic fauna in a once well-watered Sahara desert. The Ancient Egyptian was a white man to all intents and purposes. The most ancient palæolithic peoples of England, France, and the Rhine Valley were distinctly negroid in skull form and limb bones, and probably very dark in skin colour. A variety of causes isolated Trans-Saharan Africa from direct contact with the white man after the Neolithic period merged into the ages of metal. But the spell was broken by the Arab and the Portuguese. Africa is now in full contact with Europe, Asia, and America; and Europe, Asia, and America are beginning to insist that no selfish use of this great treasure-house of food and power shall be made by any single nation or group of nations.

AMERICAN LEGISLATURES AND AMERICAN COURTS.[1]

[*Contributed by* Sir Courtenay Ilbert, G.C.B.]

Professor Freund of Chicago has published, in an expanded form, the substance of a series of lectures delivered by him at Johns Hopkins University in March 1915. The purpose of his book, he tells us,

> is to suggest the possibility of supplementing the established doctrine of constitutional law which enforces legislative norms through *ex post facto* review and negation by a system of positive principles that should guide and control the making of statutes, and give a more definite meaning and context to the concept of due process of law.

An ambitious project, reminding one of the Principles of Legislation, in ten parts, which Bentham projected, but never completed, and to which his well-known book was to have served as an introduction. Not only ambitious but impracticable, the English lawyer would be disposed to add. It presupposes the possibility of a standard or norm of legislation, discoverable by lawyers, and enforceable by the courts. Is such a thing conceivable?

But it must be remembered that the attitude of the American lawyer towards legislation is not the same as that of the English lawyer. The American lawyer is apt to think of his legislatures as bodies whose activities ought to be controlled, and are controlled, by courts of law. The fundamental difference, we are all taught, between American legislatures and the legislature which sits at Westminster is that the latter is sovereign and omnipotent whilst the former are not. English courts have power to interpret authoritatively the meaning of an Act of Parliament; they have no power

[1] *Standards of American Legislation.* An Estimate of Restrictive and Constructive Factors. By Ernest Freund, Professor of Jurisprudence and Public Law in the University, Chicago. (University of Chicago Press.)

to question the validity of any of its provisions. When an Act of Parliament has received the royal assent it becomes a law, and operates unquestionably as such. There may be many questions about its conformity to sound principles, about the equity, expediency, or utility of its provisions. But these questions lie beyond the province of courts of law.

In the United States the relations between the legislatures and the courts are different. Congress, the federal legislature of the United States, derives its powers from the constitution of the United States, and its powers are limited and restricted by the articles of that constitution. The powers of the State legislatures are subject to a double set of limitations and restrictions: those imposed by the constitution of the United States, and those imposed by the constitution of the particular State. And the question whether, in the case of a particular law, those limitations and restrictions have been observed or not is a question for lawyers to argue and for courts to determine. When the President of the United States has signified his assent to a law passed by Congress, or the Governor of Illinois has signified his assent to a law passed by the legislature of that State, it cannot always be safely assumed that the law so passed will operate and require observance as a valid law. There may be between its provisions and those of the constitution, federal or State, in accordance with which it must be made, some inconsistency which will be fatal to its validity as a law. The representatives of interests liable to be affected by legislation are always on the look-out for such flaws, and lawyers are trained to detect them, and to argue about their effects. The risk of a law being upset on such grounds is one of the " hazards of legislation " to which Professor Freund refers.

The constitution of the United States, with its seven original and eight additional and amending articles, is a comparatively short and simple document. So are the constitutions of some of the older States. The constitution of the State of Oklahoma, which was adopted in 1907, and extracts from which are printed in an appendix to Lord Bryce's *American Commonwealth*, is a much longer and more elaborate document, and regulates, with great minuteness, matters of detail which one would hardly expect to find in a constitution. It specifies thirty-five restrictions on the powers of the Oklahoma legislature. Both the older and the newer, the

shorter and the longer constitutions, have one feature in common. They lay down certain general principles to be observed by the legislature in terms so wide, and sometimes in language so vague, as to leave great latitude and freedom of interpretation to the courts which have to expound them. What meaning, for instance, ought to be attached to the famous phrase "due process of law," which is not to be found in the earliest constitutions, but which pervades the later constitutions and constitutional amendments? Let us hear what Professor Freund has to say about it:

> The Supreme Court has refused to define the meaning of due process, but its underlying philosophical concept is not likely to be disputed; it stands for the idea that it is not the mere enactment of a statute in constitutional form that produces law, but the conformity of that enactment to those essentials of order and justice which in our minds are indispensable to the nature of law.

Not very illuminating this, but perhaps sufficient to indicate the kind of feeling which the average American citizen has about the functions of his courts in relation to his legislatures. He treats his courts as being the guardians of the law as it ought to be against the caprices of his legislatures. And what is the ideal law which he desires to preserve? Is it, as Coke tells us, the perfection of reason? Does not the law of a country reflect the habits, customs, usages, beliefs, opinions, prejudices, if you like, of a particular class at a particular time and under particular conditions? The law survives for future generations and into future times with different habits, customs, beliefs, opinions, prejudices, and conditions of life. It is changed by the slow, silent, unacknowledged operation of opinion on judicial decisions, or by the more direct and ruder methods of legislation. The class of lawyers may breed, often does breed, radicals and revolutionaries. But lawyers as a class are conservative. They have been bred up and trained on rules with which they are familiar, and which they know how to administer and apply; they naturally look with suspicion and disfavour on changes in those rules. Hence the influence of the courts on legislation, so far as they can exercise such influence, is a conservative influence. In a democratic country they act as a check on democratic changes, and, like other checks on democracy, their operation is sometimes salutary and sometimes the reverse. So far as they retard, for a

due time, premature and ill-considered legislation, they are a safeguard to the State. When they try to retard legislation too long, they are often trying to stem an irresistible stream, a stream which, if stemmed, will violently burst its floodgates. No satisfactory check on democratic forces, whether in the form of law courts or of a second chamber, has yet been devised by the ingenuity of statesmen, none which will stand clearly superior to the interests and prejudices of a class. But it may be that the resources of civilisation for this purpose are not yet exhausted. Professor Freund sums up the American lawyer's view when he says that " on comparing legislation with judicial justice in America it is necessary to bear in mind that the courts represent our best in government while our legislatures do not."

The general conclusions at which Professor Freund arrives cannot be accepted without important reserves, and many would think that they are too visionary to be practical. But the chief interest of his book, at least for English readers, is the light which it throws, by concrete illustrations, on the varying attitude of the courts in different States, and at different times, towards common law doctrines of old standing and towards recent legislative enactments, especially in the domain of what the Professor calls social legislation. He describes this term as meaning " those measures which are intended for the relief and elevation of the less favoured classes of the community ; it would thus be held to include factory laws, but hardly legislation for the safety of passengers on railroads." He examines the leading rules of the common law, and finds them inadequate to meet existing social conditions. He has some interesting comments on common law and public policy in their relations to each other, and pronounces the Victorian doctrines about freedom of contract, doctrines based on the paramount importance of freedom, and exemplified by the famous judgment of the late Lord Bramwell in the case of *Smith* v. *Baker*,[1] to be out of date both in England and the United States. The New York decision of 1911 [2] which declared the American Act of 1910 about compensation to workmen to be unconstitutional is a later analogue of Lord Bramwell's judgment. He describes the tasks and hazards of American legislation in its contests with the limitations and restrictions imposed by constitutional provisions, and he gives an interesting

[1] 1889, A.C. 325. [2] *Iver* v. *South Buffalo R. Co.*, 201 N.Y. 271.

account of some of those provisions. He criticises freely the defects in the form of American legislation and attributes them largely to the divorce between the legislature and the executive.

But it would be impossible, within the limits of a short notice, to do justice to the numerous points of interest for legislators and lawyers with which Professor Freund's book abounds. It deserves careful study, and provides a valuable and instructive supplement to Lord Bryce's chapters on the same subjects in his *American Commonwealth*.

FOREIGN POLICY AND THE DEMOCRACIES OF THE EMPIRE.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L.]

THE European war has brought deeply home to the democracies of the Empire two legal principles of the highest importance for their future development: the first, the right of the executive government of the United Kingdom to enter into treaties with foreign States, and to conclude understandings of vital moment without submitting the arrangements for the concurrence of Parliament or even making them public; the second, the power of the executive government with the assent of the Parliament of the United Kingdom to enter upon a war vitally affecting the self-governing Dominions without obtaining the assent of the Parliaments of the Dominions. Neither principle was indeed in the slightest degree open to controversy as a matter of constitutional law, but in both cases the impression was general that the contingencies in which they would become effective were too remote to be worth consideration. As late as March 24, 1913, the Prime Minister[1] was able to say, "There are no unpublished agreements which will restrict or hamper the freedom of the government or of Parliament to decide whether or not Great Britain should participate in a war," and in the Dominions, while public opinion occasionally resented the fact that the issues of war and peace were matters outside the scope of authority of the local governments, the only form of war anticipated was some minor conflict, such as the Boer war, from which the Dominions might if they desired hold aloof. The outbreak of the war revealed the fact that, though the Prime Minister's declaration was absolutely correct, nevertheless since 1912, as a result of an understanding between the military and naval authorities of the United Kingdom and France, the French fleet

[1] *House of Commons Debate*, L. 1317.

had been concentrated in the Mediterranean, with the result that on August 2, 1914, the British Government felt bound in fairness to France to give an assurance that "if the German fleet comes into the Channel or through the North Sea to undertake hostile operations against French coasts or shipping, the British fleet will give all the protection in its power." [1] At the same time the published correspondence [2] showed that, while the Dominion governments heartily approved the decision of the British Government and Parliament to take part in the war, they had not been kept informed of the development of the European situation in the weeks immediately preceding hostilities, and no effort had been made to secure their reasoned assent to the decision to declare war.

The Two Problems.—The decision to enter upon the war was approved by the vast majority of the British people, and reasoned examination of the policy of successive governments in the period preceding the war has failed to indicate any substantial error in the efforts of the British to preserve peace and liberty in Europe. But it has justly been felt that there must be some fundamental defect in a mode of conducting policy under which the public mind never appreciated the true significance of the redistribution of French and British naval strength which took place in 1912 and subsequent years, and did not realise that it was a necessary part of an attempt to avert the catastrophe of 1914. The old argument that secrecy in diplomacy was invaluable, as it prevented public feeling being unduly excited and permitted continuity and effectiveness of policy, has been largely discounted by the fact that secret diplomacy did not avert the war of 1914, and that it may be fairly urged that secrecy prevented the people being prepared to meet such a situation as was then brought about, while timely preparation might even have prevented the calamity. Some scheme is, therefore, demanded which will not merely secure that British diplomacy is wisely conducted, but that its principles are fully appreciated by, and approved by, the representatives of the people, and at the same time the statesmen of the Dominions have clearly indicated that in their opinion it is impossible that the present exclusive control by the United Kingdom of the conduct of foreign affairs should be allowed to persist. The two problems, it must be added, are inseparable, for

[1] See *Great Britain and the European Crisis*, pp. 80, 105.
[2] Parliamentary Paper, Cd. 7607.

it is certain that Dominion Parliaments will not consent to permit Dominion ministries to accept any degree of responsibility for foreign affairs which they cannot, when required, explain to their Parliaments, and any steps at a solution of the first must be of value in connection with the second.

Control of Foreign Policy in Other State Systems.—Unique as are the conditions to be met by any scheme affecting British foreign policy, it is of value to consider what light can be thrown on the problem by examination of other systems of regulating the conduct of foreign policy.[1] From foreign systems generally the British differs in essentials: their aim is to secure that certain classes of treaties shall not be valid without Parliamentary sanction: in the case of Britain there is no limitation whatever on the power of the Crown to conclude treaties whatever their subject-matter, but this position of unfettered discretion on the part of the executive is affected by another rule, namely that the rights of British subjects as they exist at any time in any part of the King's dominions cannot be altered save by enactments of a legislative body.[2] It is important to realise that the second principle does not in any way affect the validity of the treaty or act as a legal limitation of the treaty power: its effect is to impose an obligation on the executive to obtain from the legislature the legislation necessary to make effective the treaty, and indirectly it compels the executive to submit treaties which involve changes in law for the approval of Parliament before they become binding by ratification, but this is merely a matter of practical arrangement, not a legal obligation. Nor is publication in any degree necessary to the validity of a treaty as such, and thus the executive government, though it derives its power from Parliament, is free to use its own discretion to what extent it makes known to Parliament the engagements which it has undertaken for the country, unless of course these engagements are such that they can only be made effective by publicity, as in the case of a boundary treaty.

In France, on the contrary, the power of making treaties which

[1] See "Treatment of International Questions by Parliaments in European Countries, the United States and Japan," Parliamentary Paper, Cd. 6102, and a valuable paper, "Legislatures and Foreign Relations," by Denys P. Myers, *American Political Science Review*, 1917, pp. 643 *seq.*

[2] This is the real result of *Walker* v. *Baird*, [1892] A.C. 491, as interpreted by successive governments. The international validity of the treaty is in no wise diminished by this consideration.

is granted to the President is very definitely limited by the constitutional law of 1875: treaties of peace, of commerce, engaging the finances of the State, and those relative to the personal and property rights of Frenchmen abroad become definitive only on approval by the two Chambers, and no cession, exchange, or annexation of territory may take place save in virtue of a law.[1] Such sanction is not, however, necessary for political treaties generally including treaties of alliance, and the President is allowed to use his own discretion as to the period when any treaty need be communicated to the Chambers, though a treaty which requires the sanction of the Chambers still remains imperfect until that sanction is given. The constitution thus permits secret treaties affecting political interests of the highest importance, but against this power of the executive must be set the minute control which the French Parliament is wont to exercise over ministers, and of which in regard to treaties a remarkable instance took place in June 1917, when in secret session the agreement concluded in February with Russia was examined by the Chamber with important results.

In the German Empire also the same principle prevails: the conduct of foreign negotiations and the treaty power rest with the Emperor,[2] who exercises them through the Chancellor, who in the ultimate issue is responsible to him alone, and the Secretary of State for Foreign Affairs, who is merely a subordinate of the Chancellor. Apart from the fundamental distinction between responsibility to Parliament and to the Emperor, there are other distinctions between the two cases: the Emperor needs in any case for a declaration of war nothing more than the consent of the Federal Council, and even this is unnecessary in the case of a defensive war, while the French President is definitely obliged to obtain the consent of the Chambers to a declaration of war.[3] The number of cases in which the approval of the Reichstag is essential to the validity of treaties is much more extensive than in France: it includes every treaty affecting matters which fall within the scope of imperial legislation,[4] as well as treaties involving any change in the federal territory,[5] or the acquisition, or cession, of a protectorate or part

[1] Law of July 16, 1875, Art. 8.
[2] Constitution, Art. 11.
[3] Art. 9 of the Law of 1875.
[4] Constitution, Art. 11.
[5] This results from the definition of that territory in Art. 1. The definition has not been extended to include either Alsace-Lorraine or Heligoland.

thereof.[1] It is specially noteworthy that, though Germany has a federal constitution, in foreign affairs practically no effective recognition is given to this feature of government. The Chancellor is normally Minister President of Prussia, and while the constitution [2] provides for a Foreign Affairs Committee of the Federal Council, composed of the plenipotentiaries of Bavaria, Saxony, and Wurtemburg and two other members, elected annually by the Council, that body, which was practically in abeyance prior to 1908, has no constitutional authority over the control of foreign policy.

From both the French system, which is that normal on the Continent, and the German, which owes its peculiar features to historical considerations, the system in force in the United States differs in essentials. As was inevitable from the origin of the federation, the earliest attempts to direct foreign affairs were made by Committees representing the different States involved, and the influence of this conception is seen in the actual wording of the constitution [3] which assigns to the President power to make treaties " by and with the advice and consent of the Senate," provided two-thirds of the Senators present at the decision on a treaty concur. It is clear that it was contemplated that the President should have recourse to the Senate, not merely for their assent to a completed arrangement, but for their advice in deciding the terms of any treaty. The idea, however, was not merely impracticable, but in the long run inconsistent with the fact that the constitution contained no general provision restricting the control of foreign affairs generally by the President, although the power to declare war was assigned to Congress alone.[4] Treaties accordingly may be negotiated by direction of the President as he thinks fit without consulting either the Senate as a whole or its Foreign Relations Committee, but the consent of a two-thirds majority of the Senate is necessary for their validity, and, if accorded, they become part of the supreme law of the land.[5] The requirement of a two-thirds majority, often inconvenient, can be evaded, as in the case of the agreement with Canada for reciprocity in 1911, when the President proposed, without obtaining the consent of the Senate to a formal treaty, to procure simple legislation by Congress on the

[1] Amendment of Dec. 5, 1911, to the Protectorate Law of July 25, 1900. Mere boundary changes are excluded from the operation of the law.

[2] Art. 8.

[3] Art. II. s. 2 (2).

[4] Art. I. s. 8 (11).

[5] Art. VI. (2).

lines of the agreement made with the Canadian ministers. In either case, however, a true secret treaty is practically impossible: Senate or Congress might theoretically concur in maintaining secrecy, but such a contingency may fairly be regarded as negligible. The chief defect in the system is plainly the requirement of a two-thirds majority which opens the way to factious opposition, and has brought to nothing many well-meant efforts at treaty making, without either credit or advantage to the United States.

Publication of Treaties.—Continental and American experience alike support the view that it is unwise to seek to alter substantially the manner in which treaties are negotiated. A ministry resting, as in the United Kingdom, on a Parliamentary basis is necessarily in close touch with public opinion, and has many means of consulting the interests concerned in any negotiations, and the arguments in favour of secret diplomacy when examined are found to derive their weight precisely from the fact that the elaborate details of the actual negotiations, draft and counter-draft, are far better left to the Chanceries: a commercial treaty, for example, involves a vast number of conflicting interests, and publication of each move in the negotiations would most often result in the failure of the whole attempt. The experience of the United States is not precisely favourable to any proposal to set up a Parliamentary Committee charged with the control of negotiations, and the alternative of creating a small Council of past Secretaries of State for Foreign Affairs to advise the Secretary of State would hardly yield sufficient positive advantage to counterbalance the additional element of delay and division introduced, especially as the advice of any predecessor in office would always be freely tendered if asked for privately. But the chief objection to such schemes lies in the fact that they rest, in ultimate analysis, on the theory that foreign policy must be treated as a matter for experts alone, and made either a matter of arrangement between ministers and ex-ministers or reserved for a limited class of members of Parliament who will make such topics their special study. It was undoubtedly a step for the better when foreign politics became dissociated from party strife, but the value of this change was seriously diminished by the simultaneous withdrawal of such topics from public knowledge, and the pressing demand of the time is to restore, or create, public interest in, and understanding of, foreign affairs. If, as a result of this

action, foreign politics again become subject to party influence, this will be due to fundamental divergences in the aims of different sections of the people, which ought to find expression in the Parliament of the nation.

To secure this end various means may be suggested, but the most simple is the extension of the practice of requiring the approval of Parliament to treaties concluded by the executive, thus bringing the activity of the government in foreign affairs under the same species of control as is applied to its activity in domestic problems. To effect this it would be necessary to secure two principles: first, that no treaty should be binding on the Crown unless and until approved by Parliament, and, second, that every treaty must be communicated to Parliament within a short period after signature. These rules could be made effective for all practical purposes by a mere resolution of the House of Commons or by an address to the Crown, though the prerogative could only be formally limited by an Act of Parliament. In the case of minor agreements a very brief discussion would often suffice, but the mere fact that the agreements might be criticised in Parliament would be sufficient to improve in a substantial degree the work of the government departments in the preparation of the treaties in question. To make the scheme effective it would, of course, be necessary to lay down clearly that it applied to every kind of understanding importing an obligation actual or contingent, and not merely to arrangements embodied in formal treaty shape. Moreover, the practice would be in accord with the tendency of recent years for the executive to decline responsibility for important treaties without obtaining the sanction of the legislature, a principle deliberately asserted in the case of the Heligoland agreement of 1890 [1] and followed in the case of the settlement with France regarding Morocco and Newfoundland in 1904,[2] though in the latter case the public documents which were communicated to Parliament were supplemented by secret articles which ought never to have been withheld from Parliament.[3] The advantage of the intervention of Parliament can hardly be seriously questioned since the case of the Declaration of London; though it

[1] 53 & 54 Vict. c. 20.

[2] 4 Ed. VII. c. 33.

[3] They affirmed the principle of support of French rights in Morocco, which was in a sense the starting-point of the tension in Europe which finally led to war.

was only indirectly on a minor point that legislation was requisite and Parliament was asked to intervene, it was nevertheless able to prevent the ratification of an instrument which would have caused great difficulty in the present war, while the refusal of Mr. Asquith's Government to submit the Declaration as a whole to the consideration of Parliament is a striking instance of the tendency of the executive government to evade subjecting its action to the superior wisdom of the legislature.

The Position of the Dominions.—In the case of the Dominions difficulties in treaty matters arise only in connection with political treaties, such as those of alliance, guarantee of territory, and regulation of the laws of war. In all other cases it is now clearly established [1] that the Crown will, at the request of a Dominion government, be advised to grant full powers to representatives of the Dominion to negotiate with the representatives of foreign States, whether on matters of special interest to the Dominion concerned only, or on general international questions, in the discussion of which the government of the United Kingdom is separately represented by its special representatives. It is true that, as ratification in respect of the Dominion is expressed by the King on the advice of the government of the United Kingdom, though that government acts in accordance with the wishes of the Dominion government, an opportunity is afforded to the Imperial government to make representations to secure that no Dominion ignores the interests of the Empire as a whole, but it is clear that so long as any real tie exists between the United Kingdom and the Dominions some such right of representation [2] must exist. The practical freedom of Dominion governments is strikingly exemplified by the compact between Canada and the United States of 1911, which would have become effective but for opposition in Canada: the agreement would have seriously affected British interests, but beyond pointing out the relative considerations to the Dominion government the British government refrained from action to thwart the wishes of that administration.

There still, however, exists the very real question of the par-

[1] Cf. Sir Hibbert Tupper's article, *Journal*, vol. xvii. pp. 5–18. In the history of the extension of the power of the Dominions in this regard an active and important part was played by the late Sir Charles Tupper.

[2] The Dominions of course very freely exercise the right of criticism of British diplomacy, as in the case of the New Hebrides agreement in 1906.

ticipation of the Dominions in the negotiation of political engagements and in the control of foreign politics. The simple, obvious, and fascinating solution is the creation of a true federal government to represent the whole Empire, but this solution may be laid aside [1] for the simple reason that of the Dominions New Zealand alone shows any inclination for even a very modified form of federation, while the scheme has been negatived not less decisively by Sir Robert Borden [2] than by Sir Wilfrid Laurier for Canada, has been bitterly denounced as inimical to liberty by the chief supporters of the Labour party of the Commonwealth,[3] and is wholly and vehemently repudiated by General Smuts and General Botha. The war in fact, while it has emphasised the desire of Dominion statesmen to be taken into confidence on matters of foreign policy, has impressed strongly on the people of the Dominions the grave interference with their dearly loved autonomy which federation would involve. Great as the services and sacrifices of the Dominions have been, it is only necessary to compare the weight of conscription and of taxation in the United Kingdom with conditions in the Dominions to realise that under a federal system the Dominions would have been infinitely more hard pressed than in fact they have been, and in view of that fact it is idle to expect that the people of any Dominion will seriously change their present position: it is of importance that even in New Zealand Parliament has never approved the principle of federation as a practical scheme. If, however, any perfectly logical system is impossible, it is not difficult to suggest means by which the Dominions may have a considerable measure of knowledge of, and some power of control of, foreign policy. In the case of political treaties steps should be taken to include representatives of the Dominions among the negotiators by the grant of full powers to nominees of the Dominion governments to represent the Crown in respect of the Dominion, as has already been done with success in the case of such conferences as the Radio-telegraphy Conference.[4] The treaty arrived at by the negotiators would then be subject to the approval of the Dominion Parliament, and if so approved be ratified by the King for the Dominion. The

[1] For a detailed discussion see *Canadian Law Times*, Nov. 1916, and cf. A. P. Poley, *Journal*, vol. xvii. pp. 30–44.

[2] See Canadian *Hansard*, May 18, 1917, p. 1603.

[3] Cf. *Round Table*, vii. 610—12.

[4] Cf. *Imperial Unity and the Dominions*, pp. 288 *seq.*

ratification would, in the last resort, rest upon the authority of the government of the United Kingdom, but the limited power of intervention thus secured to that government is obviously indispensable so long as the Dominions do not desire to be independent States, and *de facto* a case of interference would hardly ever arise, since the only concatenation of circumstances which could produce grave divergence of view would be the negotiation of a treaty which, after fuller consideration, the Imperial government did not desire to ratify, while ratification was none the less insisted upon by a Dominion government. This mode of procedure would secure that no political treaty could be concluded without the participation of Dominion negotiators, if the Dominions desired, and that no such treaty would become binding on the Dominions without the approval of their Parliaments, while the explanation of treaties would afford opportunity for the instruction of the people of the Dominions in the subject of foreign relations. Cases would no doubt be possible in which a treaty accepted and ratified by the United Kingdom and the majority of the Dominions was not accepted by another Dominion, and the obvious criticism may be offered that such a result in the case of a political treaty in the narrow sense of the word would be equivalent to a fatal breach in the unity of the Empire. But in this case and many others it is wise to recognise the deficiencies of existing conceptions of political relations, which are due to the traditions of unitary states, and to accept the dictum of General Smuts, who has assured us that "if we disabuse our minds of precedents and preconceived ideas, we shall evolve, in the course of years, the institutions and machinery that will meet our difficulties." The relations of the Dominions and the United Kingdom are *sui generis*, and foreign Powers are now familiar with the special status and position of these governments.

There still remains the question of keeping the Dominions informed of, and allowing them to express their views on, the business of the Foreign Office other than treaty negotiation. The most valuable machinery for this purpose will doubtless be an annual meeting of Dominion ministers as desired by General Smuts,[1] when foreign policy will be the essential topic of discussion. In the intervals between the meetings of this Imperial Cabinet—a somewhat misleading term—the business would of course be conducted by

[1] See his speech at the Parliamentary Congress of May 15, 1917.

the British Cabinet, but certain obvious steps might be taken to keep the Dominions as fully informed as possible of developments. Those Dominions which accept the scheme of maintaining a Minister Resident in London, proposed by Mr. Harcourt [1] in 1912, could make use of him as means of learning and commenting on developments in foreign politics, while Dominions which are unwilling to trust such a minister might be informed by telegraph of any urgent matters, and might be supplied with copies of important despatches from His Majesty's representatives in foreign States. While such a procedure would in one sense be a very important innovation, it would none the less be merely carrying out to a logical conclusion the existing practice in all matters directly affecting the Dominions and it would simply be tantamount to a declaration that the time had come when the interests of the Dominions in foreign politics had so expanded that they were entitled to the same treatment in matters of general foreign policy as is now accorded to them in matters of foreign policy directly concerning Dominion interests. It would, of course, rest with each Dominion from time to time to determine to what degree it desired to have information accorded and to make representations on such matters: Sir Wilfrid Laurier, for example, has disclaimed any general wish to be consulted on all British questions of foreign policy, and this elasticity would facilitate the smooth working of the scheme. Doubtless there would be risk of imprudent disclosures by Dominion ministers to their Parliaments or otherwise, and causes of friction between the British and the Dominion governments might be engendered. But the value of secrecy in diplomacy has been in some degree discounted by its failure to prevent the disappointments of the present war, and it is idle to hope that great civilised communities will indefinitely consent to remain ignorant of, and without a voice in, questions of foreign policy.

[1] Parliamentary Paper, Cd. 6560.

THE CENSORSHIP UNDER NAPOLEON I

[*Contributed by* J. Holland Rose, Esq., Litt.D.]

There is a general impression that the harsh censorship of the First Empire was due to Napoleon himself. This is incorrect. As in many other spheres, he merely continued in a more regular form the regulations of the Revolutionists. Their practice had singularly violated the principles of liberty of thought inscribed in the Declaration of the Rights of Man and in the constitutions of 1793 and 1795. Art. 11 of the Rights of Man (1789) ran thus: "The free communication of thoughts and opinions is one of the most precious rights of man. Every citizen, then, may speak, write, print freely, except that he shall answer for the abuse of this liberty in the cases determined by law."[1] The abuse of liberty became so flagrant that, first Siéyès, and then Le Chapelier brought forward proposals to curb it. The latter, in August 1791, carried a measure which maintained liberty of the Press except in cases of "designedly provoking disobedience to the law, insult of the constituted authorities and resistance to their acts, or of one of the actions declared criminal by law."[2] Criticism on public men was allowed, but intentional calumnies on their probity, and insults against the private life of any one, could be proceeded against. This measure was embodied in the constitution of September 1791, but seems to have had little effect in stopping the indiscriminate abuse of public men by writers like Marat and Hébert.

Not until the seizure of power by the extreme Jacobins was a measure passed forbidding any opposition whatever to the existing political régime. In the urgent national crisis which ensued after the defection of General Dumouriez to the Austrian invaders, the Convention (urged on by the new Committee of Public Safety) passed the following decree (March 31, 1793): "Whoever shall be

[1] Wickham Legg, *Select Documents of the French Revolution*, vol. ii. p. 217.
[2] *Ibid.* vol. ii. p. 124.

convicted of having composed or printed works or writing urging the dissolution of the National Representation, the re-establishment of royalty or any other power hostile to the sovereignty of the people, shall be handed over to the extraordinary Tribunal and punished with death." Thereafter some twenty journalists and fifty writers were guillotined, and liberty of the Press vanished *de facto*, though the new Declaration of the Rights of Man declared it to be illimitable.

The Attitude of the Jacobins.—Reasserted in the Constitution of 1795, this principle was violated by its *soi-disant* champions in the *coup d'état* of Fructidor 1797; they enacted the death penalty against all who should seek to re-establish royalty or the Constitution of 1793; they imprisoned sixty pressmen, banished forty-four more, and suppressed forty-two newspapers for the alleged crime of "railing at Nature and compromising the human race." Their opponents, led by Siéyès, seized on power in September 1799 and destroyed the printing-machines of eleven Jacobinical journals. Thus, Bonaparte, on becoming First Consul two months later, inherited a tradition which, while proclaiming liberty of opinion, made use of Rousseau's doctrine of the people's sovereignty to crush political opponents. In all their oscillation between theoretical liberty and liberticide practice the Jacobins and their political legatee, Bonaparte, did but carry out the injunction of Rousseau: "Whoever refuses to obey the general will shall be constrained to do so by the whole body, which means nothing else than that he shall be forced to be free," and his dictum that the State should banish the anti-social man, or even, on his recantation, put him to death.[1] In these statements is to be found the source of the doctrine so profitably exploited by the Jacobins for securing their own supremacy over a comparatively apathetic majority.

By the *coup d'état* of Brumaire 1799, which installed Bonaparte in power, France hoped to assure a policy of moderation both abroad and at home as well as to safeguard personal liberty, which every party had in turn violated. As Benjamin Constant well said: "Arbitrary procedure had been the death-germ for all institutions." In some respects Bonaparte gratified the moderates; but, alleging the violence and folly of the Press in interfering with foreign policy and military affairs, he secured the passing of the

[1] Rousseau, *Le Contrat Social*, Bk. I. ch. vii., Bk. IV. ch. viii.

decree of January 17, 1800, which suppressed fifty political newspapers out of sixty-three and forbade the establishment of new journals.

As the new constitution was silent on the topic of political and civic liberty, this extraordinary act aroused little opposition among a people weary of the wranglings of factions. Indeed, the provincials seem to have welcomed the measure as making for peace and quietness. In April 1800, Fouché, the Argus-eyed Minister of Police, was charged with oversight of the Press, and his bureau controlled all dramatic performances and the issue of all pamphlets and posters. The Prefects of the Departments, appointed by Bonaparte, wielded similar powers and reported regularly to Paris as to the conduct of the journals and the state of public opinion. Official articles were constantly inserted in newspapers so as to guide public opinion; and the First Consul eagerly scanned the leading French and British journals so as to feel the pulse of the two nations. It is a sign of his inability to understand the spirit of British institutions that, not long after the signature of the Peace of Amiens, he protested violently against attacks on him made by a French *émigré*, Peltier, in a paper, *L'Ambigu*, published in London, though the French official journal, *Le Moniteur*, bristled with sharp comments on England and her policy. Finally, the Addington Cabinet decided to prosecute Peltier for libel; but after the renewal of war with France, the affair dropped.

A System of Governmental Spying.—The autocratic spirit grew in Bonaparte with every success; and after becoming Consul for Life (August 1802) he not only gained far stricter control over all parts of the governmental machine, but accorded legislative powers to his creatures, the Senate. In 1805 he instructed the senators to repair to their districts, termed *sénatoreries*, in order to report weekly on everything of note, including the fortune, the character, and the opinions of conspicuous persons. It may be questioned whether, since the time of the Emperor Tiberius, a more elaborate system of governmental spying has been set up on so extensive a scale. The deep distrust of Napoleon for the French, especially for the Parisians, prompted him to indiscreet outbursts, as when he said (April 1804): "This city has ever been the curse of France. Its inhabitants, who are ungrateful and light-headed, have conceived the worst possible designs against me, and they would have been

well pleased if Georges [Cadoudal] had triumphed and I had fallen. I cannot consider myself in safety in Paris unless surrounded by a numerous garrison." To the obsequious Council of State he also remarked: "The character of the French nation requires that liberty of the Press should be restricted in the case of works of a certain size; and the newspapers must be subjected to the rigid surveillance of the police." [1]

The Commission on Liberty of the Press.—He attained his aims in the early days of the Empire. The *Senatus Consultum* of May 18, 1804, which declared him Emperor, also appointed a Commission of seven senators, termed the Commission on Liberty of the Press, with power to declare that liberty of the Press had been infringed.

The character of the Senate, and of the seven senators chosen for this purpose, was sufficient guarantee that no declaration of this kind would ever be made; and none was made until April 3, 1814, eight days before Napoleon's first abdication. During the Empire the Press was controlled more and more severely both in France and in her vassal States. Thus, on May 30, 1805, the Emperor wrote to Fouché: "The newspapers must not be allowed to take a line favourable to Russia—to that corrupt, weak and silly Cabinet. . . . Have caricatures made—an Englishman, purse in hand, entreating the various Powers to take his money. This is the real direction to give to the whole business. . . . Have it circulated in Holland that news comes from Madeira that Villeneuve has fallen in with and captured an English convoy of 100 sail" [2] [which was false]. Many other quotations might be given as to Napoleon's rebukes to independent editors and the vigilant direction of the Press exerted by Fouché and his police. Yet the title of the Commission enabled Napoleon to deny that the censorship existed; and on January 15, 1806, he rebuked Fouché for authorising the publication of a book in terms which indirectly implied its existence. Nevertheless, on February 7 he ordered the supersession of all ecclesiastical journals by one termed *Le Journal des Curés*. Similarly, the formerly independent *Journal des Débats* became for the time *Le Journal de l'Empire*, directed by "four intellectuals attached to the Government." Thus, by various skilful devices,

[1] Pelet, *Napoleon in Council* (Eng. Transl. by B. Hall), 1837, pp. 99, 307.
[2] *New Letters of Napoleon I.* Translated by Lady Mary Lloyd, p. 24.

Napoleon erected a drastic censorship, even while he officially denied that such a control existed.

As the increasing servility of the Press restricted the expression of independent thought to the domain of literature, Napoleon sought to subject it also to his all-embracing domination.

Napoleon's Personal Action.—Already in September 1803 a decree was passed ordering that every book exposed for sale must first be submitted to a commission of revision, which, if necessary, would refer it to Fouché's department; and a decree of July 10, 1804, allotted to him the surveillance of all books. Occasionally Napoleon consulted other persons as to the desirability of allowing the publication of a book bearing on politics, history, or philosophy. Thus, he asked the advice of Cambacérès, formerly Second Consul, whether a new edition of the *Mémoires de Louis XIV* should be allowed to appear. Or, again, he sometimes intervened with a personal veto, as happened in the case of the later writings of the eminent astronomer, Lalande. He first ordered the learned body, *l'Institut de France*, to rebuke Lalande for uttering atheistical opinions from motives of senile vanity; and when the astronomer persisted in publishing, the Emperor forbade the appearance of his works, because, as he informed the Council of State on May 21, 1806, atheism was "a principle destructive of all social organisation."[1] So too he prohibited the French Academy from discussing the policy of Mirabeau. "What has the Academy to do with policy (he said) any more than the rules of grammar have with the rules of war?"[2] (letter to Fouché, May 20, 1807). It will thus be seen that Napoleon aspired not only to control all publications, but also to forbid (as he phrased it) "the manifestation of ideas which trouble the peace of the State, its interests and good order."

Nothing reveals more clearly the jealous and meticulous care of the Emperor in defending "order" (that is, the imperial system) than his dealings with all writers who showed an independent spirit. The poet Delille narrowly escaped imprisonment for referring too feelingly to the victims of the Terror in his poem *La Pitié*, and thenceforth confined himself to safer topics such as praise of rustic peace—while the conqueror's cannon were thundering all over Europe. It soon came to be known that Napoleon disapproved of plays, poems, and treaties referring to modern times. On one

[1] Napoléon, *Correspondance*, vol. xi. p. 472. [2] *Ibid.* vol. xv. p. 251.

occasion he forbade the representation of a play dealing with Henri IV because " that epoch is too modern not to revive passions. The stage needs pieces of antiquity." Even the period of the Roman Empire was, however, suspect in his eyes if the writer ventured on criticisms of the Emperors. Napoleon's dislike of Tacitus and his virtual ban of that writer in the colleges and *lycées* were due to a nervous fear that the analysis of the motives of tyrants would lead to dangerous comparisons. To the same preoccupation may be ascribed his demand that the treatment of historical subjects should be strictly and solely objective. History must become merely a recital of facts. The type of chronicle which he favoured was that of Lacretelle's *Précis historique de la Révolution française*, which is indeed merely a *précis*. He appointed him professor of history and also dramatic censor. Lemontey, a chronicler of the same type, became chief of the *bureau de la police littéraire*; and the autocratic leanings of both these men procured them similar employment under Louis XVIII. Mme. de Genlis, a keen opponent of Mme. de Staël, sent to Napoleon periodical reports on the literary output; but, apart from the three just named, none of the directors of liberty of the Press was, with the doubtful exception of Fiévée, a person of literary distinction. The prime requisite was absolute devotion to Napoleon. Savary, Duc de Rovigo, who succeeded Fouché, incarnated that imperial virtue, and may be classed among the unscrupulous and servile courtiers who helped to bring ruin upon the Emperor and the Empire. It is, however, only fair to say that in the years of decline, 1813–14, Napoleon's rancour against the least sign of criticism in the Press increased amidst growing adversity, and he hounded on the directors to increasing severity. Consequently, the official journals were ignored, and the official plays, remarkable only for fulsome adulation, were sometimes hissed off the stage. This happened even to a play designed to show up the brutalities of the Cossack and Prussian invaders of March 1814 in Champagne. " False as a bulletin " was a current saying at that time. " Tame as an official play " might have been added; for the Nemesis of rigid direction had arrived; atrophy of brain power and entire absence of freshness and reality characterised the laborious writing to order which took the place of true literature and vital journalism. Not even the rewards offered in Napoleon's elaborate system of literary prizes

could breathe life into the timidly calculating performances of that decade.

The Exile of Mme. de Staël.—If space permitted, a review might be attempted of the long duel between the Emperor and the foremost authoress of that age. The fresh and enthusiastic nature of Mme. de Staël forbade her conforming to his many regulations; and his keen dislike of *idéologues*, especially of philosophising women, barred the way to all reconciliation. Her romance *Delphine* (1802), which she published while in exile at Coppet, aroused his sharp resentment. Its exaltation of the claims of individual liberty against those of political and social order led him to declaim against her "vagabond imagination, disorder of mind, and sentimental metaphysics"; and he remarked in his salon that she had better not return to France. After prolonged visits to Italy and Germany she published *Corinne, ou l'Italie* (1805) and *De l'Allemagne* (1810). Her glorification of the culture of those lands was judged by him to be treason to France. The French noble, who in *Corinne* typifies *la légèreté de la France*, is contrasted with the more manly and solid virtues of the Scot, Lord Melvil; and Napoleon pronounced the book "*antifrançais, anglophile.*" In point of fact the authorities had informed her that all objections to the book would disappear if she would insert in the book a eulogy of Napoleon. This she absolutely refused to do, as entirely inconsistent with the ideals of liberty and enthusiasm extolled in that work. Her panegyric of German thought (especially of Goethe's circle at Weimar) fared even worse. The cosmopolitan tone of *De l'Allemagne*, especially its praise of German thought and British action, profoundly annoyed the Emperor. At first he ordered Savary to expunge three-fourths of her references to England; and she herself cherished some hopes of bending the Emperor by a personal interview. It was refused; and the final judgment of Savary—"Your book is not at all French"—carried with it sentence of doom for the book and of a second exile for the gifted authoress.[1] The judgment of posterity on the Napoleonic censorship may be summarised in the statement that his tyranny over the world of letters and journalism spread a miasma over those who obeyed him, and drove into exile the only two writers of eminence who dared to disobey him, Mme. de Staël and Chateaubriand.

[1] For details see P. Gautier, *Mme. de Staël et Napoléon* (Plon, 1903).

The moral of our brief inquiry is clear. The French Revolutionists of 1793 and 1795 made a disastrous blunder when they turned the censorship of the Press (then much needed to curb gross insults and homicidal suggestions) into an engine of political repression. The natural results followed. Napoleon did no more than perfect Jacobinical methods, perverting them, however, to the suppression both of political and intellectual freedom. Consequently, the Senate in its decree of *déchéance* (April 3, 1814) assigned as a leading motive for its action Napoleon's persistent violation of liberty of the Press and its degradation into an instrument of tyranny. The charge was true. The wheel had come full circle. The organ of the Jacobinical extravagances of 1793 had, within two decades, become the tool of a militarist despotism.

ARCHDEACON PALEY AS A JURIST.

[*Contributed by* G. Glover Alexander, Esq., LL.M.]

William Paley, D.D., Archdeacon of Carlisle, the author of the well-known *Evidences of Christianity*, was born at Peterborough in 1743, and died at Lincoln in 1805. He came of good, north-country, yeoman stock, which had long been settled in the parish of Giggleswick, near Settle, in the northern part of the West Riding of Yorkshire. His father was a graduate of the University of Cambridge, having been a sizar of Christ's College (the college of Milton, which Paley the younger was destined still further to adorn, though in a very different way) and at the time his son was born he was a minor canon of Peterborough Cathedral. Two years after that event, in 1745, his father was appointed Head Master of Giggleswick Grammar School, which he did so much to improve that his salary was gradually advanced from £80 to £200 a year. This fact is mentioned because it shows that his father must have been a man of ability and force of character. It was at Giggleswick Grammar School that the future Archdeacon was educated, under his father's eye. As a schoolboy he did not exhibit any particular signs of future eminence, being fonder of mechanics and fishing than of his books; but his father predicted a career of distinction for him, saying, "He has by far the *clearest* head I ever met with in my life." But the bent of his mind toward law was early shown, for we are told that "a visit to the Assizes at Lancaster interested him so much that he afterwards played at judging his schoolfellows." In November 1758 he was entered at his father's college as a sizar, and in going into residence in October 1759 he was elected to a foundation scholarship. The story of how he was aroused from sloth and indolence to industry, and how he graduated as senior wrangler, has been told so often that it needs no re-telling. In May 1759, before going up to Cambridge, he was present at York Assizes at the

trial of Eugene Aram (immortalised by Thomas Hood's poem and by Bulwer Lytton's novel) in which trial he took a profound interest and about which he afterwards very sagaciously remarked that Aram "got himself hanged by his own cleverness." He took his B.A. degree, as it has been said, as senior wrangler, in 1762. Immediately afterwards he took a post as usher in an academy at Greenwich, and while residing there he "attended trials at the Old Bailey and gained some knowledge of criminal law." While in London he took holy orders and became curate to the Vicar of Greenwich. He was elected a fellow of his college (Christ's) in 1766, and returned into residence, becoming in due time tutor and lecturer. While an undergraduate, his tutor was John Wilson, who was senior wrangler in 1761, and afterwards Sir John Wilson, knight, and a judge of the Common Pleas. In 1777 Paley received the vicarage of Appleby, worth then £200 a year, and while residing there he delighted to welcome the members of the Bar going the old northern circuit, particularly his old tutor Wilson, who died at Kendal in 1793 as the result of a paralytic seizure. This was another link that bound him to the profession of the law. Indeed all his life, in spite of the fact that he was primarily a college don and a clergyman, he was more or less connected with the profession of the law, and that was the profession for which he considered himself best suited.

In 1782 Paley became Archdeacon of Carlisle, the character in which he is best known. In his case, the office was a sinecure, since the duties of it were discharged by the chancellor of the diocese, R. Burns, D.C.L., the author of the well-known treatise on the office of *Justice of the Peace*. In 1785, however, Dr. Burns died, and Paley became the chancellor of the diocese, a position which approached more nearly to a judicial office. It may now be supposed that he was in his element, but his judicial duties do not appear to have been very onerous, judging by the amount of literary work he was able to do during the latter part of his life. He was also appointed a justice of the peace, but apparently he was not a success in that capacity, as he proved "irascible." He became Prebendary of St. Paul's and Subdean of Lincoln, where he died, while in residence, in 1805; but notwithstanding his great learning and ability, and his eminence as a theologian and a philosopher, he never became a bishop, probably for reasons that will be indicated hereafter.

Throughout the whole of his life he was honourably distinguished by his consistent advocacy of the emancipation of the slaves.

Personal Characteristics.—As to his personal characteristics Mr. Leslie Stephen says of him, he was—

> an interesting personality, fond of a game of cards and cracking small jokes, and, in spite of much that has been said to the contrary, based chiefly on an alleged somewhat elastic conscience, an upright and sincerely pious, though not an emotional man. *His great feature was his strong common sense, his breadth of view, and his power of making a clear statement.*[1]

These are all extremely desirable and important qualities in a lawyer. The same writer also says of him: "*He was the incarnation of strong common sense*, full of genial good humour, and always disposed to take life pleasantly."[2] And again: "Nobody has surpassed Paley as a writer of text-books. He is an unrivalled expositor of plain arguments, though he neither claimed nor showed much originality."[3] Both his *Moral and Political Philosophy*, and his still more famous work, *The Evidences of Christianity*, were, it may be observed, avowedly written as and intended to be text-books.

Sir J. Fitzjames Stephen praises his "exquisite and masterly style"—"a style which shows not merely the possession of wonderful literary power, but the consciousness of addressing a critical, well-instructed and deeply interested audience, already well acquainted with the main points of the subject." He also speaks of Paley's "own admirable language which is itself a title to fame, whatever may be said of his arguments."[4] Even John Austin praises "his clear, vivid, downright English style."

"The Principles of Moral and Political Philosophy."—This book, upon which his claim to be regarded as a jurist chiefly rests, was published in 1785, and passed through no fewer than fifteen editions during the author's lifetime. Such was Paley's reputation as a teacher, and so great was the expectations formed of it, that he was paid £1,000 for the MS., and the book "was received with prodigious applause." It represents the result of several years' work at Cambridge, and was in fact an expansion of his lectures there.

[1] *Dict. Nat. Biog., sub nom.* Paley. [2] *Ibid.* [3] *Ibid.*
[4] See his Essay on Paley's *Evidences*, in *Horæ Sabbaticæ*.

The subject of Moral Philosophy was for a long time a favourite one in the University of Cambridge, as an adjunct both of law and theology, and still finds a place in the Moral Sciences Tripos. But as Paley understood and treated it, "the subject of morals" (as he styles it in the Preface to his book) corresponds to what we now call Casuistry, rather than to Ethics. It is equivalent to "the direction of private consciences in the general conduct of human life"; it is not an attempt to find a scientific basis for morals in psychology or metaphysics, or partly in one and partly in the other, which sometimes results in losing sight of the main object of the search in the search itself. With Paley the subject was a purely practical one, and speculation enters into it very little. We shall not, therefore, follow him further into his philosophy than to observe that he treats of such subjects as The Law of Honour, The Scriptures, The Moral Sense, Human Happiness, Virtue, Why am I obliged to keep my word? The Will of God, The Divine Benevolence, Lies, Oaths, Charity, The Treatment of our Domestics and Dependants, Slavery, Resentment, Anger, Revenge, Gratitude, Marriage and Marriage Institutions, Polygamy, and (in one comprehensive book, V.) Duties towards God, The Duty and Efficacy of Prayer, and a number of other similar topics which are not usually included in law books or even in books on morals. The truth is, Paley was not constitutionally and naturally fitted for speculation. His mind, as Dr. Whewell points out, "had altogether a practical and not a metaphysical turn." [1] "He had no taste and therefore little aptitude for metaphysical disquisitions." [2] It is sufficient to notice that his philosophy is utilitarian, based on expediency, and opposed to the theory of a moral sense or instinct. Paley, says Prof. Dicey, "stands nearer to Bentham" (than Blackstone). "His theology and his moral philosophy are avowedly utilitarian." He has a separate chapter on Utility, and in fact came very near to being the inventor and expounder of that famous theory. In 1786 George Wilson, a friend of Bentham, who was then staying with his brother in Russia, wrote to Bentham, urging him to come home, and saying that Paley, "a parson and an archdeacon," was anticipating him. Bentham came home, and in 1789 published his *Principles of Morals and Legislation*. It has indeed been said that Paley's view of the theory of Utility differed from Bentham's only by the addition of a super-

[1] *History of Moral Philosophy*, p. 170. [2] *Ibid.* p. 169.

natural sanction. He also forestalled Bentham in many of his notions about punishment, so that it has been suggested Paley may possibly have seen an Introduction to Bentham's work published in 1783. Paley, however, ascribed his inspiration to Tucker's *Light of Nature.*

Paley had two peculiarities as a writer for which he thought it necessary in his Preface to make some excuse or apology. The first of these is that he very seldom refers to any other book,or mentions the name of any author, whose thoughts or even whose expressions he had adopted. This renders it somewhat difficult to know upon what authorities he based his statements, and to trace the gradual formation and development of his opinions.

There was, however, one work to which he owed so much that he felt compelled to express his obligation. This was *The Light of Nature* by Abraham Tucker.

The author of this voluminous work (the first three volumes of which were published in 1768 and the last four posthumously in 1774) was Abraham Tucker, a Surrey country gentleman, who was educated at Oxford and received a legal training, but never practised. Of this book Paley says[1]:

> There is, however, one work to which I owe so much, that it would be ungrateful not to confess the obligation: I mean the writings of the late Abraham Tucker, Esq. . . . I have found in this writer more original thinking and observation upon the several subjects that he has taken in hand, than in any other, not to say, than in all others put together. His talent also for illustration is unrivalled.

Dr. Whewell asserts that Tucker was "the favourite author of Paley," and says:

> This work cannot, I think, be looked upon as occupying any very important place in the *progress* of moral philosophy; but there is in it an original, unsystematic freedom of thinking, and a temperate good sense and virtuous moral feeling which are peculiarly English. There is, moreover, and this is the quality which has most struck the notice of its admirers, a fertility and brilliance of illustration which are almost unrivalled, and which make it a mine of thought for its speculative readers.[2]

Sir J. Fitzjames Stephen has a very interesting and charmingly

[1] Preface, xxv.

[2] *Hist. of Moral Philos.* p. 159.

written essay on Tucker's *Light of Nature* in his *Horæ Sabbaticæ*. He begins by saying:

> There are in the world a certain number of remarkable books which have a reputation only in small but influential classes. They are, for the most part, books which are not on the popular side, which are rather powerful than attractive, and which, for some reason or other, lie out of the general current of literature;

and adds:

> it would be difficult to find a stronger illustration than is afforded by the book named at the head of this article.

He points out that Tucker's metaphysics "are little more than an expansion of Locke, with some special adaptations to Tucker's own mind," and asserts that Paley's *Moral Philosophy* is "nothing, or little more, than an adaptation of one limb of Tucker's book, and is cast, as all Paley's books are cast, in a far less satisfactory mould." If this be true, and there is no reason whatever to doubt it, we see at once what was the chief formative influence upon Paley and his views, and where he got most of them from. We have his own confession, and one can easily realise that Paley's own good sense, power of illustration, and peculiarly English habit of thought were confirmed by Tucker, if not actually derived from him.

It is probable that Paley was also well acquainted with Rutherford's *Institutes of Natural Law*, published in 1754, and Taylor's *Elements of Civil Law*, published in 1755, both of which appear to have been common text-books at Cambridge while he was in residence and lecturing there.[1] To the former writer (Dr. Rutherford) he also alludes in the Preface, as "a writer upon the law of nature whose explications in every part of philosophy, though always diffuse, are often very successful." And it is almost certain that he had read Blackstone's *Commentaries* published in 1765–70, though I do not think that he anywhere refers to them. It is quite certain, however, that his mind was thoroughly imbued and permeated with legal ideas and habits of thought and legal modes of expression. Thus, in discussing the existence of a moral sense or instinct, he asks the question whether, if a certain pathetic story from Roman history (the story of Caius Toranius, a cruel son who

[1] See Whewell's *Hist. of Moral Philos.* Sect. xi.

betrayed his father) had been told to the wild boy of Hanover, he would have felt about it the same sentiments of disapprobation that we feel or not, and he puts the question in this form :

They who maintain the existence of a moral sense—of innate maxims, etc.—affirm that he would.

They who deny the existence of a moral sense, etc., affirm that he would not.

And upon this, issue is joined.

Here we have a discussion or problem on a question of moral philosophy thrown into the form of a legal pleading, not by a lawyer, but by a college don and clergyman! Could anything show more clearly the legal bent of Paley's mind? And this example occurs after he had been complaining in the Preface, with delightful inconsistency, that the writings of Grotius and the larger work of Puffendorf are of "*too forensic* a cast, too much mixed up with the civil law and with the jurisprudence of Germany, to answer precisely the design of a system of ethics." Truly Paley was somewhat of a humorist as well as a lawyer, *malgré lui*. Incidentally he also complains in the Preface of the profusion of classical quotations and allusions in the writings of the authors just named and "with which many of their pages abound," and says they cannot claim to be anything more than ornaments, and are not to be regarded as serious arguments—another proof of his practical character and modern views.

The other matter for which Paley thought some apology might be expected is the joining together of moral and political philosophy, or, as he puts it, "the addition of a book of politics to a system of ethics." This he justifies partly on the ground that "political philosophy is, properly speaking, a continuation of moral philosophy; or rather indeed a part of it"; a sort of moral philosophy "writ large"; but chiefly on the ground of "the necessity of *general* rules"; and he reminds the reader of his work that "the doctrine of general rules pervades and connects the whole."

When he comes to expound the theory of Utility (chap. vi.) and in his chapters on The Necessity of General Rules (chap. vii.) and The Considerations of General Consequences Pursued (chap. viii.) he develops this idea more fully. "So their actions are to be estimated by their tendency." "Whatever is expedient is right." "But

then it must be expedient upon the whole, at the long run, in all its effects collateral and remote, as well as in those which are immediate and direct." "I shall here subjoin a string of instances." Now, it is very remarkable that every one of the instances or illustrations that he gives is a common crime, viz. coining, forgery, sheep or horse stealing, house breaking and smuggling—showing how completely his mind was pervaded and dominated by legal ideas and notions. In particular, what he says about sheep stealing affords a good specimen both of his style and his arguments:

> The particular consequence of sheep stealing, or horse stealing, is, a loss to the owner, to the amount of the value of the sheep or horse stolen: the general consequence is, that the land could not be occupied, nor the market supplied,

if this form of theft were permitted. He further says:

> And what proves incontestably the superior importance of general consequences is, that crimes are the same, and are treated in the same manner, though the particular consequences be very different. The crime and fate of the housebreaker is the same, whether his booty be five pounds or fifty. And the reason is, that the general consequence is the same.

But he deals even more directly than this with many topics of a strictly legal nature, which would be found appropriately in a law book, *e.g.* Property, The Use and Institution of Property, The History of Property, Contracts (of various kinds), Oaths and Wills.

Property.—It was his short but famous chapter on Property that acquired for him the nickname of "Pigeon Paley." It is a piece of pure Socialism, and yet a true picture of society, a picture which could have been painted only by one who had at some period of his life been compelled by stress of circumstances painfully to contemplate the very unequal and inequitable distribution of wealth. It compares society with a flock of pigeons feeding, much to the disadvantage of human beings. Mr. Leslie Stephen says he was warned that this chapter might exclude him from a bishopric. "Bishop or no bishop," said Paley, "it shall go in." If this story is true, it does honour both to Paley's head and heart, and silences for ever his detractors who ascribed unworthy motives to him and alleged that he sacrificed the dictates

of conscience to private gain. Paley, however, was not a Socialist or visionary, and when he comes to deal with property in land he points out with great perspicacity what is undoubtedly the true basis of property: "The real foundation of our right is the Law of the Land," *i.e.* of the country. He also considerably modifies his view of private property in his chapter on the Use and Institution of Property, pointing out its principal advantages, viz. (1) it increases the produce of the earth, (2) it preserves the produce of the earth until it reaches maturity, (3) it prevents contests, (4) it improves the conveniency of living: "exchange implies property," and (5) it encourages the arts by which the accommodations of human life are supplied. "The balance, therefore, upon the whole, must preponderate in favour of property with manifest and great excess." Though he adds that "Inequality of property in the degree in which it exists in most of the countries of Europe, abstractedly considered, is an evil"; and that "If there be any great inequality unconnected with this origin (industry) it ought to be corrected."

Contracts.—He deals with contracts of (1) sale, (2) hazard, *e.g.* gaming and insurance, (3) the lending of inconsumable property, *e.g.* the lease of a house or a farm, the loan of a horse, a book, or a harpsichord, "when the identical thing is to be returned" (bailments), and (4) labour, under which head he treats of service, commissions, partnership, and offices. But it must be confessed that he deals rather with the moral principles underlying these matters than with the strictly legal aspect of them. It is under the head of offices that Paley goes out of his way to justify or defend the holding of pluralities. "The non-residence of the parochial clergy, who supply the duty of their benefices by curates" (he says), "is worthy of a more distinct consideration." This consideration he gives to the subject by observing that the whole revenue of the national Church may be regarded as a "common fund" for the support of the national religion, and—

> if a clergyman be serving the cause of Christianity and Protestantism, it makes very little difference out of what particular portion of this fund, that is, by the tithe or glebe of what particular parish, his service be requited. . . .
>
> Upon the principle thus explained this indulgence is due to none more than to those who are occupied in cultivating or communicating religious knowledge or the services subsidiary to religion.

This was a very comfortable and salutary doctrine (suitable to the times), and to none more than to the good Mr. Paley lecturing at Cambridge. It is not now worth while to point out its fallacy. It is out of date. Not the least of the evils of such a system was, that it produced within the Church those very inequalities of wealth of which Paley himself so bitterly complained in society at large.

Wills.—In treating of wills, Paley observes :

> No doubt many beneficial purposes are attained by extending the owner's power over his property beyond his life and beyond his natural right. It invites to industry ; it encourages marriage ; it secures the dutifulness and dependency of children. But a limit must be assigned to the duration of this power.

He then states, quite accurately, " the rule against perpetuities."

He points out that " Wills are the creatures of the municipal law, which gives them their efficacy," and discusses casuistically the question whether the intention of the maker of an informal will is binding upon the conscience of those who, by operation of law, succeed to his estate. This is an unprofitable inquiry to an English lawyer, since we have nothing in the nature of *codicili* and *fidei-commissa* (in the strict sense in which these terms are used in Roman Law), and with us " Equity follows the Law." It does not attempt to patch up an invalid will in order to carry out the testator's wishes. But this is a very good illustration of the manner in which Paley approached such questions.

Another sagacious remark he makes about wills is :

> The not making a will is a very culpable omission, when it is attended with the following effects : where it leaves daughters or younger children at the mercy of the eldest son ; where it distributes a personal fortune equally amongst the children, although there is no equality in their exigencies or situations ; where it leaves an opening for litigation ; or lastly and principally, where it defrauds creditors ; for by a defect in our law, which has been long and strangely overlooked, real estates are not subject to the payment of debts by simple contract, unless made so by will.

This last defect, it may be pointed out, was long ago remedied, in 1833. But the first, the so-called " law of primogeniture," still remains a blot on our law of the descent of land. As to the second, it is clear that Paley did not agree that " equality is equity " in all

cases. What he apparently meant to say and enforce was that the making of a will is in most cases a matter that requires grave consideration, and that more attention ought to be given to the varied needs and circumstances of those dependent on the testator than is usually the case. He also touches on intestate succession to personal estate, and remarks on the jurisdiction of the ecclesiastical courts in matters of probate. This, he says, "is a peculiarity in the English law." It ceased to be so in 1857, when the Probate Court was established, with its district registries.

Paley on Forms of Government and the British Constitution.—It is, however, when we come to Book VI., The Elements of Political Knowledge, that we find Paley both at his best and his worst. He treats in this book, Of the Origin of Civil Government, How Subjection to Civil Government is maintained, The Duty of Submission to Civil Government explained, Of the Duty of Civil Obedience as stated in the Scriptures, and Of Civil Liberty, the last of which will be discussed more fully hereafter in connection with Austin's views thereon. Paley appears at his worst, it is said, in his two chapters, Of Different Forms of Government and Of the British Constitution. He here discusses the relative advantages and disadvantages of monarchy, aristocracy, and republic (or democracy), and applies them to the government of England, which, he says, "has been sometimes called a mixed government, sometimes a limited monarchy," and is "formed by a combination of the three regular species of government: the monarchy, residing in the King; the aristocracy, in the House of Lords; and the republic, being represented by the House of Commons." He continues: "The perfection intended by such a scheme of government is, to unite the advantages of the several simple forms, and to exclude the inconveniences." He then proceeds to explain and amplify these advantages, and to minimise those inconveniences, as found in the English Constitution as it then existed, even going so far as to justify, at considerable length, the gross anomalies and injustices of the old unreformed House of Commons as it existed before the Reform Act of 1832. In so doing he was simply following Blackstone, as he himself was followed by Burke. It was, indeed, a commonplace of the eighteenth century that the happy union of the three principles or forms of government to be found in the British Constitution represented the height of human wisdom. But the British Constitu-

tion, owing to its elasticity and the political genius of the nation, has advanced a long way since then. Here, we repeat, Paley was at his worst. He was, in fact, as Professor Dicey has pointed out, a mere "apologist." But those who condemn Paley and the others who thought and wrote in the same strain seem to forget that this perhaps excessive laudation of the British Constitution as a mixed or limited monarchy was probably due to a revolt, on the one hand, against the doctrine of the Divine Right of Kings, and on the other hand, against the horrors and excesses of the French revolution.

Professor A. V. Dicey (in his *Law and Public Opinion in England*) describes Paley as "a man of calm and judicial temperament," and "a hard-headed and honest moralist"; he says that he was "at bottom as much a defender of the existing state of things as was Blackstone." Nevertheless, he speaks of Paley's chapter on the English Constitution as an "excellent" one. Paley therein describes the growth of the English Constitution and compares it with an irregularly built but beautiful old mansion. This chapter was deemed worthy of being printed and published separately.

The Administration of Justice.—Paley appears at his very best in the two chapters of the sixth book of the work in question, entitled Of the Administration of Justice, and Of Crimes and Punishments. Making allowance for some defects, due to the prevalent opinions of the times in which he lived, there is a surprising breadth of view and modernness in his views upon these subjects. They may be summarised thus:

> The first maxim of a free state is, that the laws be made by one set of men, and administered by another; in other words, that the legislative and the judicial characters be kept separate. . . . The next security for the impartial administration of justice, especially in decisions to which the government is a party, is the independence of the judges. . . . A third precaution to be observed in the formation of courts of justice, is, that the number of judges be small. . . .

Here he interpolates what appears to be a somewhat strange remark. "I should prefer," he says,

> an *even* to an *odd* number of judges, and four to almost any other number; for in this number, besides that it sufficiently consults the idea of separate responsibility, nothing can be decided but by a majority of three to one.

It does not seem to have occurred to him that an abortive appeal, by reason of the fact that the court is equally divided, is a result of litigation much to be avoided. This is the great fault to be found with a Divisional Court consisting of two judges only, and the reason why each branch of the Court of Appeal generally consists of three judges, the ideal number, since they must either be unanimous or two to one, and so a decision is secured.[1]

A fourth requisite in the constitution of a court of justice, and equivalent to many checks upon the discretion of judges, is, that the proceedings be carried on in public, *apertis foribus*; not only before a promiscuous concourse of bystanders, but in the audience of the whole profession of the law. The opinion of the Bar concerning what passes will be impartial, and will commonly guide that of the public.

Here again Paley anticipates Bentham in the great value and importance to be attached to publicity in legal proceedings. "Something is also gained to the public by appointing two or three courts of concurrent jurisdiction; that it may remain in the option of the suitor to which he will resort." This remark obviously refers to the three Courts of Common Law (the King's Bench, the Common Pleas, and the Exchequer) as they existed before the Judicature Acts; but it has not found favour of late years.

Trial by Judge and Jury.—As might be expected, Paley praises the English system of trial by judge and jury, which unites the two kinds of judicature which he calls the *fixed* (the judge) and the *casual* (the jury). "The judge imparts to the jury the benefit of his erudition and experience; the jury, by their disinterestedness, check any corrupt partialities of the judge." He was not, however, enamoured of the system of summary jurisdiction, which has grown to such large dimensions in our time.

In proportion to the acknowledged excellency of this mode of trial, every deviation from it ought to be watched with vigilance, and admitted

[1] In the well-known case of *Paquin, Ltd.* v. *Beauclerk* (*Holden*), [1906] A.C. 148, in the House of Lords, this inconvenience arose. Of the four law lords sitting, two were in favour of affirming the decision of the Court of Appeal, and two were in favour of reversing it. Hence, a deadlock. But the rule in such a case is that the decision of the inferior Court stands, though no costs of appeal are allowed.

In the still more recent case of *Cheater* v. *Cater*, [1917] 2 K.B. 516, two judges forming a Divisional Court differed in their judgments. The decision of the County Court judge, which was appealed against, therefore stood.

by the legislature with caution and reluctance. Summary convictions before justices of the peace, especially for offences against the game laws; courts of conscience, extending the jurisdiction of courts of equity; urging too far the distinction between questions of law and matters of fact; are all so many infringements upon this great charter of public safety.

No junior member of the Common Law Bar could have gone much further in defence of his privileges.

Paley also discusses at considerable length the question how far precedents ought to be binding, and the numerous uncertainties and difficulties of the actual administration of justice, including the rule which requires that juries must be unanimous in their verdicts, and the position of the House of Lords as a final court of appeal.

Paley on Criminal Law.—In his chapter Of Crimes and Punishments, Paley begins by saying: "The proper end of human punishment is not the satisfaction of justice, but the prevention of crimes. By the satisfaction of justice I mean the retribution of so much pain for so much guilt." Sir J. F. Stephen, however, in his *General View of the Criminal Law*, shows that the satisfaction of the desire for vengeance is one, and by no means the least important, of the objects of punishments, if the State wishes to prevent duels, vendettas, and lynchings. But Paley was far in advance of his time in insisting upon the view that the prevention of the commission of crimes is the chief object of the criminal law. This can be brought about only by the reformation of the offender. Hence the modern system of Probation, Borstal Institutions, and the restraint, without harsh treatment, of the habitual offender.

Paley observes:

> There are two methods of administering penal justice. The first method assigns capital punishment to few offences and inflicts it invariably. The second method assigns capital punishment to many kinds of offences, but inflicts it only upon a few examples of each kind.

He is strongly in favour of the second method, and advances several reasons in support of it. "The latter of which two methods has been long adopted in this country, where, of those who receive sentence of death, scarcely one in ten is executed." Here again Paley simply reflects the current opinion of his time. Thanks to

the humane labours of Sir Samuel Romilly and others, all that has long ago been changed, and the first method now prevails in England, but even now the sentence is not invariably inflicted. Paley himself admitted that there was one species of crime, "the making of which capital can hardly, I think, be defended," viz. that of "privately stealing from the person." This sounds like an echo of the noble words of Sir Thomas More, in his *Utopia*, on the same subject. Later on Paley says that "the frequency of capital executions in this country owes its necessity to three causes—much liberty, great cities, and the want of a punishment, short of death, possessing a sufficient degree of terror"; and upon each of these causes he enlarges at length. To us now all this seems like "flogging a dead horse," but it must be remembered that penal servitude had not then been invented. He seems to be on firmer ground when he says:

> The end of punishment is two-fold, *amendment* and *example*. In the first of these, the reformation of criminals, little has been effected, and little, I fear, is practicable. . . . Of the reforming punishments which have not yet been tried, none promises so much success as that of solitary imprisonment. . . . But the principal difficulty remains still: namely, how to dispose of criminals after their enlargement. . . . This is the common misfortune of public punishments, that they preclude the offender from all honest means of future support.

This difficulty we still have with us, in spite of the admirable efforts of the Discharged Prisoners' Aid Society. Paley, however, shows his own natural kindness of heart by saying (in a footnote): "Until this inconvenience be remedied, small offences had, perhaps, better go unpunished. I do not mean that the law should exempt them from punishment, but that private persons should be tender in prosecuting them." But surely there could be no greater condemnation of the whole system than the necessity for such a recommendation.

In one passage he shows a foresight and keenness of vision far in advance of his time. The passage is too long to quote here, and it is well known. The pith of it is contained in the first sentence: "The certainty of punishment is of more consequence than the severity." The truth is that Paley, if an apologist like Blackstone, was also an optimist; and was not without a strong sense of humanity and justice.

Austin and Paley.—There are four matters, started by Paley, which Austin in his *Lectures on Jurisprudence* discusses at some length. They are: (1) "His (Paley's) erroneous views of obligation and sanction"; (2) "His erroneous definitions of civil and political liberty"; (3) "His rule for the interpretation of contracts"; and (4) "His statement of the differences arising from the competition of opposite analogies."

(1) As to the first of these, Paley says: "A man is said to be obliged when he is urged by a violent motive resulting from the will of another." "The motive must be violent" and "it must result from the command of another." "Whenever the motive is violent enough, and coupled with the idea of command, authority, law, or the will of a superior, then, I take it, we always reckon ourselves to be obliged." On this Austin remarks:

> I observe that Dr. Paley, in his analysis of the term *obligation*, lays too much stress upon the *violence* of the motive to compliance. In so far as I can gather a meaning from his loose and inconsistent statement, his meaning appears to be this: that, unless the motive to compliance be *violent* or *intense*, the expression or intimation of a wish is not a *command*, nor does the party to whom it is directed lie under a *duty* to regard it.

It must be admitted that the use of the word "violent" is somewhat unhappy. Had Paley said "strong" or "strong enough," there would have been very little point in Austin's criticism, since every sanction must be strong enough to effect its purpose, *i.e.* to produce obedience, otherwise it is no sanction at all. By the way, the "loose and inconsistent statement" is quite in Austin's usual style. It will be observed how nearly Paley's idea of law as "command, authority, or the will of a superior," agrees with Austin's idea of law as a "species of command, which, when it proceeds from a political superior, constitutes *positive law*."

The true view appears to be that all sanctions are not violent, though some of them, and probably most, undoubtedly are. Thus the sanctions of the criminal law are nearly all of them violent, some of them excessively so, *e.g.* capital punishment; and Paley was speaking of a type, not giving an exact and exhaustive definition of a sanction. Half the differences of lawyers and jurists, like those of philosophers, are mere logomachies, disputes about verbal niceties, instead of a striving after truth and substance. They do not

recognise that, owing to the imperfection of human language, it is almost impossible to frame a perfect definition of a term or thing, and therefore it is much better to argue about types, making allowance for deviation from those types. They are therefore apt to become hypercritical. On the contrary, some sanctions are very slight. It would puzzle a strict Austinian to discover what is the sanction in the case of the recent Summer Time Act, though most people would call an Act of Parliament a law.

(2) As to the second: Paley's definition of Civil Liberty is, "the not being restrained by any Law but what conduces in a greater degree to the public welfare."

> To do what we will is *natural* liberty; to do what we will consistently with the interest of the community to which we belong is *civil* liberty, that is to say, the only liberty to be desired in a state of civil society.

In Austin's view civil liberty consists in "the absence of legal restraint," whether such restraint has never been imposed, or, having been imposed, has been withdrawn. He observes: "Paley's admired definition of Civil Liberty appears to be obnoxious to the same objection," viz. that it tends to confound "positive law" with the "science of legislation." "It is a definition of civil liberty as it ought to be." After quoting Paley's definition, given above, he says:

> This is distinguished from natural liberty, which is one not being restrained at all. But when liberty is not exactly synonymous with right, it means, and can mean nothing else, but exemption from restraint or obligation, and is therefore altogether incompatible with law, the very idea of which implies restraint and obligation.

This is a piece of very close reasoning and no doubt correct from Austin's point of view, though not of much practical value. But then it must be remembered that Paley was treating of political philosophy, or the science of legislation, while Austin treats of strict, positive law. The difference between them is that between politics and law.

(3) As to the third: Paley defines a contract as a "mutual promise," but he does not quite grasp the important fact that it must be "enforceable at law," though the quality of mutuality seems to impose or imply the doctrine of consideration. He says

"the sense" in which contracts "are to be interpreted, and the cases in which they are not binding, will be the same as promises." This throws us back upon what he says as to promises. In his view: "When the terms of a promise admit of more senses than one, the promise is to be performed in that sense in which the promiser apprehended at the time that the promisee received it." This dictum has given rise to a good deal of discussion. Austin dissents from it, and says: "The true rule is the understanding of both parties. The very use of Paley's rule shows that it embraces both."

Those who have read Anson on Contracts will remember that this difficult question is discussed therein, from a strictly legal point of view, as it affects the formation of contract in English law, under the head of *Mistake as to the nature of the promise, known to the party to whom the promise is made*, and is illustrated by a series of four propositions based on an imaginary sale of a piece of Dresden china; and under the sub-heading, *Mistake of buyer as to quality promised, known to seller*, the question is further discussed in connection with what is known as the rule in *Smith* v. *Hughes* (the "old oats" case), in which it was held that the plaintiff could recover if he merely knew that the defendant thought he was buying old oats, but not if he knew that the defendant thought he was being promised old oats. The distinction is a fine one, and borders on psychology. It is another instance of the truth of the dictum of Lord Bramwell that the state of a man's mind is as much a question of fact as the state of his digestion. In *Smith* v. *Hughes*, Hannen J. said: It is essential to a contract that both parties should agree to the same thing in the same sense." This is often expressed by saying that their minds must be *ad idem*, otherwise there is no contract. On this point, therefore, Austin was quite right when he said it must be the sense in which *both* parties understood the promise, and Paley was wrong. At the same time it must not be forgotten that the standard of English law is an objective one, and as Anson says: "The question is not what the parties thought, but what they said and did."

(4) The fourth passage to which Austin takes exception occurs in Paley's chapter on The Administration of Justice. He says:

> After all the certainty and rest that can be given to points of law, either by the interpretation of the legislature or the authority of precedents, one principal source of disputation, into which indeed the greater

part of legal controversies may be resolved, will remain still, namely, the competition of opposite analogies.

When a point of law has once been definitely decided, in relation to certain facts, that point is settled once for all. But other questions may arise, in relation to slightly different facts, "which resemble this only indirectly or in part," "which can be brought within any fixed rule only by analogy, and which hold a relation by analogy to different rules." He continues:

> It is by the urging of the different analogies that the contention of the Bar is carried on; and it is in the comparison, adjustment, and reconciliation of them one with another, in the discerning of such distinctions, and in the framing of such a determination as may save the various rules alleged in the cause, or, if that be impossible, may give up the weaker analogy to the stronger, that the sagacity and wisdom of the court are exercised.

Austin refers to this passage twice, once[1] where he seems to think that Paley was speaking only of "the application of the law, as already ascertained, to the case which awaits solution," and finds fault with Sir S. Romilly for having apparently thought that it applied to "the extraction of the law," *i.e.* "the discovery of the law by interpretation or other induction"; and again,[2] where he seems to have changed that opinion and to have seen that it applied to both, or, as he puts it, to "two distinct processes."

In his *Elements of Law* the late Dr. Markby says: "I think Paley's description of forensic disputation and judicial decision is both forcible and accurate."

The process followed by a lawyer is fully and admirably discussed by Sir F. Pollock in his essay on *The Science of Case Law* (*Essays in Jurisprudence and Ethics*). He there describes what happens when a lawyer advises on a case. "His first step is to get a clear conception of the facts of the case, such facts, that is, as are likely to be material to the result." "He will then guess provisionally to what department of the law the case belongs." "He will then know whereabouts to look, either in a text-book or in his memory, for the law which seems to be applicable." Eventually he gets a "current of authority" and perhaps "one or two stray cases, of not more than co-ordinate authority, which give an opposite result." Between

[1] *Lectures on Jurisp.* vol. ii. p. 653. [2] *Ibid.* vol. ii. p. 1030.

this current of authority and these cases he has to make a comparison and selection and arrive at a conclusion. "And lastly, he must observe the right points of likeness and unlikeness in the cases he compares." Though Sir F. Pollock does not refer to Paley, or even mention him, what is this in effect but Paley's "competition of opposite analogies"?

Austin's Estimate of Paley.—In spite of the criticisms mentioned above, Austin had a much higher opinion of Paley than he had of Blackstone. His savage onslaught on Blackstone is well known.[1] His animus against Blackstone is indeed so strong as to have given rise to the witty remark that he could never forgive Blackstone for writing good English. To Paley he was much more just, possibly because Paley was a utilitarian.

As to Paley's book he observes[2]:

> The treatise by Doctor Paley on Moral and Political Philosophy exemplifies the natural tendency of narrow and domineering interests to pervert the course of inquiry from its legitimate purpose. . . .
>
> As men go, this celebrated and influential writer was a wise and virtuous man. By the qualities of his head and heart, by the cast of his talents and affections, he was fitted, in a high degree, to seek ethical truth, and to expound it successfully to others. He had a clear and just understanding, a hearty contempt of paradox, and of ingenious but useless refinements; no fastidious disdain of the working people, but a warm sympathy with their homely enjoyments and sufferings. . . . But the sinister influence of the position which he unluckily occupied cramped his generous affections and warped the rectitude of his understanding.

He half sneers at Paley thus[3]:

> A steady pursuit of the consequences indicated by general utility was not the most obvious way to professional advancement, nor even the short cut to extensive reputation.

He blames him for not having written a book which would have appealed to the middle classes and working people:

> To readers of the middle classes and of all the higher classes of the working people, a well-made and honest treatise on Moral and Political Philosophy, in his clear, vivid, downright English style, would have been the most easy and attractive, as well as instructive and useful, of abstract or scientific books.

[1] *Lectures*, vol. i. p. 71. [2] *Ibid.* vol. i. p. 138. [3] *Ibid.* vol. i. p. 139.

On this it may be observed that Bentham, great as his influence has undoubtedly been in the sphere of morals and legislation, failed to write such a book, owing perhaps to the obscurity of his later style. Paley, says Austin, truckled to "the classes which are elevated by rank or opulence," and to the "peculiar professions which are distinguished by the name of liberal"; and accordingly, "the character of the book which he wrote betrays the character of the writer"—as most books do.

Yet Austin pays a high tribute to Paley:

> He was one of the greatest and best of the great and excellent writers, who, by the strength of their philosophical genius, or by their large and tolerant spirit, have given imperishable lustre to the Church of England, and extinguished or softened the hostility of many who reject her creed. He may rank with the Berkeleys and Butlers, with the Burnets, Tillotsons, and Hoadlys.

It would be difficult to bestow greater praise than this. He, however, takes away the merit of this generous tribute by adding:

> But, in spite of the esteem with which I regard his memory, truth compels me to add that the book is unworthy of the man. For there is much ignoble truckling to the dominant and influential few. There is a deal of shabby sophistry in defence or extenuation of abuses which the few are interested in upholding.

The fact that Austin refers so frequently to Paley, and the length at which he discusses his views, coupled with this estimate of Paley's personal character and the character of his work, show the esteem in which Austin held him. There is scarcely any other writer to whom Austin refers so often or so fully, except Blackstone (his *bête noire*) and Bentham (his idol). Paley seems to come between these two in his estimation. It is probably the position that Paley would have chosen for himself, since he was in all things a moderate man. One thing is quite clear, that Austin must have been a diligent reader of Paley's writings.

Professor Dicey on Paley.—But perhaps the most just estimate of Paley is that by Professor A. V. Dicey[1]:

> Paley stands in spirit nearer to Bentham. His theology and his moral philosophy are avowedly utilitarian. His writings betray a

[1] *Law and Public Opinion in England in the Nineteenth Century*, 1st ed. p. 142.

keen interest in legal problems. He possessed the intellect of an enlightened lawyer. But he probably did not believe that law could be treated as a science ; he either had not grasped, or did not care to work out, the idea that the laws of England might be systematically remodelled so as to promote the greatest happiness of the greatest number of Englishmen. His philosophy, utilitarian though it was, is, in so far as he applied it to law, an ingenious defence of things as they stood in 1786. He is neither an innovation nor a reformer, but like Blackstone an apologist.

To this may be added that he was invariably on the side of humanity and justice, and pointed out some defects in our law and its administration.

Paley's Position in Jurisprudence.—It may be asked, What, then, is Paley's position in the field of English jurisprudence ? In order to answer this question it is necessary to remember that the term jurisprudence is used in two senses: (1) a wide, generic sense, and (2) a narrow, specific sense. In its wide sense it may be divided into three distinct branches, viz. :

(1) The history of law ; law as it has been. In this sense typical writers on law are the late Sir Henry S. Maine, the late Professor F. W. Maitland, and Sir F. Pollock. They represent the historical school of jurisprudence, in whose view most institutions now in existence can best be explained and understood in the light of what has been in the past.

(2) Jurisprudence " properly so called," according to Austin's " law as it is " ; the logic or grammar of law ; the analysis of its pervading notions, principles, and distinctions, and its terminology. In this department of the subject it must be confessed that Austin, with his clearness of perception and strong critical faculty, holds the field. Although many of his views have of late years been subjected to a good deal of very incisive and destructive criticism, it is not too much to say that since he lectured and wrote, most books on jurisprudence have been mainly devoted to an attack on, or defence of, his conception and analysis of law. In this respect he may be compared with Euclid in the field of geometry. He represents the analytical school of jurisprudence, as opposed to the historical ; and there can be but little doubt that the great defect of Austinianism is its contempt for the teachings of history in law as in every other department of knowledge. Amongst the best-known critics of Austin's views

are Sir Erskine Holland (whose book on Jurisprudence has the great merit of being constructive as well as destructive, and puts forward an alternative system of classification, etc.), Mr. Frederic Harrison, Mr. E. Robertson (in his article on Jurisprudence in the *Encyclopædia Britannica*), Mr. J. W. Salmond, and Professor Jethro Brown. Each of these writers has shown that the Austinian conception and analysis of law, though no doubt accurate under certain conditions, is not of universal application and cannot be accepted without considerable limitation and modification.

(3) Legislation: "law as it ought to be," and therefore probably will be; the law of the future. In this branch beyond all question Bentham is our greatest writer. His first book on this subject, published in 1789, was entitled *An Introduction to the Principles of Morals and Legislation*, showing how closely allied, in his opinion, is the science of morality with that of jurisprudence. It is here that Paley comes in. He was professedly a writer on morals, but such was the bent of his mind and his disposition that he was in reality a writer on jurisprudence in its wide sense (in which it covers the whole field of legal science), as well as in one of its specific senses. We have seen how nearly he came to being the inventor or expounder of the theory of Utility. He was in fact the forerunner of Bentham.

Sir J. F. Stephen and Rev. G. Milner on Paley.—We are not here concerned with Paley's theological works, but it may be observed that his forensic skill and acumen nowhere appear more strongly than in his *Horæ Paulinæ*. Some years ago Sir J. F. Stephen, in the pages of *The Saturday Review*, pointed out the likelihood of a revival of the cult of Paley, "whose labours appear to us to have fallen into very unmerited contempt, although attentive observers may trace signs of their regaining, in a modified shape and with alterations, the influence which they deserve." A more recent writer, the Rev. G. Milner, M.A., in a very interesting article on Paley, whom he styles *The Last of the Latitudinarians*,[1] has also done justice to him in this respect. Both these writers refer to his fondness for law. Sir J. F. Stephen, referring to the charge of religious insincerity brought against Paley (which he warmly denies), says: "The same sentiment would generally be expressed by saying that Paley was cold-hearted, that he held a brief for Christianity, and wrote as a lawyer would

[1] See *The Modern Churchman* for April 1915.

speak, not for conscience' sake, but for his fee, or at best for his own side." And again :

His argument all along is continually built upon the assumption that the twelve Apostles were a sort of special jury, as much accustomed to the rules of evidence, and as fully determined never to believe any fact whatever without judicial proof of it, as Lord Thurlow or Lord Ellenborough.

It is somewhat doubtful to this day whether Paley regarded the "twelve men," to whom he was constantly referring, as jurors or witnesses. Mr. Milner says of Paley : "He was a constant visitor at the law courts and delighted in legal arguments. His mind indeed had a strongly forensic tinge." "Unkind people, remarking this legal bias in his *Evidences of Christianity*, have complained of his 'Old Bailey' manner, and have said that in that treatise the twelve Apostles are, so to speak, put on trial for perjury and triumphantly acquitted." This view makes it appear that he treated them not only as jurors and witnesses, but as prisoners also.

Conclusion.—Austin's attitude towards Paley has been shown. It was, on the whole, kindly and fair, and does Austin credit, as the two men were of totally different temperament and training. Austin was steeped to the lips in German literature and philosophy. One has only to look at the list of his books (now in the Inner Temple Library) given in the Preface to his *Lectures on Jurisprudence*[1] to see this. He had, in fact, a German mind (at a time when the German mind was at its best), but withal, with something of German rigidity and intellectual arrogance. Paley, on the other hand, had a typically English mind, the product of the English system of education and university life. It is doubtful whether he knew any German, or had read any German books, except through the medium of translations. Yet he was a great writer and a great man, and a jurist of no mean eminence. In one sense, of course, it would be idle to compare the two men, since their works were very different. Each had his own sphere ; but that sphere was largely determined by his training and temperament, the influence of which appears repeatedly in their respective works. Austin, coming later, had an advantage of criticising Paley and his writings, and found in them much that was good.

[1] 4th ed. 1879

AMERICAN WAR MEASURES.

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WITH the entrance of the United States as an active participant in the now almost universal world war has come an enormous expansion in governmental activities, and with this a great increase in administrative agencies. This development has been based more largely than in other countries on legislation passed by Congress. But, as in other countries, the legislation has been enacted to a large degree under executive leadership; and, mainly under the congressional Acts, there has been a vast extension of executive authority. Under the Constitution of the United States Congress has the power to levy taxes, borrow money, and make appropriations, to declare war, to raise and support armies and a navy, and to make rules for the government of the land and naval forces; while the President is vested with executive power and is also commander-in-chief of the army and navy.

Acts of Congress.—While granting extensive powers, Acts of Congress have been more specific and more detailed than the legislation of other countries; and while there has been effective executive leadership, there has also been active discussion and modification of the proposed measures by the legislative branch. On some measures there was criticism of delay; but on the whole there has been an impressive body of constructive legislation enacted.

Some measures passed before 1917 have had a direct bearing on the conduct of the war. Among these may be mentioned the War Risks Insurance Act of 1914, and the National Defence Act, the Army Appropriations Act, and the Shipping Board Act of 1916; while the federal reserve banks established in 1913 have also been important agencies in financial matters.

Among the measures passed at the special session of Congress

beginning April 2, 1917, may be noted: the Joint Resolution of April 6, declaring a state of war to exist between the German government and the government and people of the United States; the War Loan Acts; the Appropriation Acts; the Selective Draft Act of May 18; Acts of May 22 to increase the naval forces; an Act of June 12 to amend the War Risks Insurance Act; the Exports and Espionage Act of June 21; the Priority Act of August 6; the Foods and Fuel Regulation Acts of August 10; the War Revenue Act; the Act of October 6 to regulate trading with the enemy; and the Act for soldiers' and sailors' insurance.

At the regular session of Congress, beginning in December 1917, a declaration of war against Austria-Hungary was voted; several investigations by congressional committees into the conduct of war preparations have been begun; and additional legislation for the development and further re-organisation of governmental agencies has been proposed.

Executive Orders and Proclamations.—The increase of executive authority in time of war is partly indicated by the number and importance of executive orders and proclamations issued by the President. Most of those issued thus far in the present war have been definitely authorised by Acts of Congress; but, while there has been no such striking illustration of the inherent war powers of the President as the Emancipation Proclamation of President Lincoln, there have been some acts of the President done "by virtue of the powers vested in me as such." Such, for example, were the proclamations of April 6, May 24, and July 13 with reference to German insurance companies and letters patent. The executive order of April 13, creating a committee on public information, and the proclamation of May 23 establishing rules and regulations for the Panama Canal appear to have no statutory authority.

Among the orders and proclamations issued under Acts of Congress may be noted the executive orders of April 5 and 14, establishing defensive sea areas; the proclamation of April 6 declaring a state of war and defining the status of alien enemies; the proclamation of April 16 relating to treason and misprision of treason; proclamations fixing dates for army registration, and calling the national guard into the service of the United States; and executive orders relating to foreign trade, enemy property, food and fuel administration, and railroad control.

Financial Measures.—Before the declaration of war, on March 2, 1917, a special naval appropriation of $535,000,000 was voted. Early in the special session of Congress, the Deficiency Appropriation Bill carried an extraordinary item of $100,000,000, to be expended at the discretion of the President. The War Appropriation Act of June 2, 1917, carried total grants of $3,281,094,541. An appropriation of $640,000,000 was made for the establishment and development of the aviation service. A second War Appropriation Act amounted to $5,356,666,016. The total authorised expenditure for the first year was $12,067,278,679. In addition Congress has authorised loans to the Allies up to $7,000,000,000. Before the war the total expenditures of the United States national government were about $1,000,000,000 a year.

The first Loan Act authorised the issue of $7,000,000,000 in bonds and certificates; and a second Act authorised loans to the total amount of $13,538,945,460. Heavy taxation has also been imposed, including progressive income and excess profits taxes, and taxes on liquors, railroad fares, amusements, and many other items.

Armed Forces.—In 1914 the United States navy ranked third among the principal nations, with a total tonnage somewhat below that of Germany and about one-third that of Great Britain. By the latter part of 1917 there were three times as many ships in commission as on April 1; and the naval personnel had been increased from 66,000 to about 250,000 men.

In 1916 the regular army of the United States consisted of less than 100,000; and the national guard or militia of the several States had about an equal number. In December 1917, the regular army had been increased to approximately 360,000, and the national guard (which was drafted into the United States service in August) to about 500,000. Under the Selected Service Act of May 18, 1917, 9,659,382 men between the ages of twenty-one and thirty registered for national service. The first contingent of 687,000 were called to service in September; and about 500,000 were in the new national army by the end of the year.

These forces have been gathered at various army posts, national guard camps, and sixteen national army cantonments in different parts of the country; and several hundred thousand have crossed the Atlantic. Two series of officers' training camps were conducted in the summer and autumn of 1917; and a third series was opened

in January 1918. Special schools and camps have also been established for training aviators, medical officers, quartermasters, and other special classes.

Administrative Agencies.—In addition to the great expansion of activities in the older government departments and bureaus, many new administrative agencies have been organised. A considerable number of these are in the previously established departments. In the Department of State a new division of foreign information has been established. In connection with the Department of War the new national army has required the organisation of thousands of local exemption boards and of district boards of appeal, as well as the establishment of training camps. Other new army and navy agencies are the commission on training camp activities and joint boards on aircraft. In December 1917, a war council was established, to advise the Secretary of War; and early in 1918 a surveyor of purchases was appointed and the general staff of the army reorganised. In the Department of Agriculture, two new assistant secretaries have been appointed; and a joint labour committee of the Departments of Agriculture and Labour has been established. The Department of Labour has been greatly expanded. An emergency fleet corporation has been organised by the United States shipping board for the construction of new ships.

Other agencies have been established outside of the former governmental organisation. Among these may be noted the national council of defence, the committee on public information, the food and fuel commissioners, the war industries board, the war trade board, and the director-general of railroads.

Council of National Defence.—S. 2 of the Army Appropriation Act of August 29, 1916, established a council of national defence, for the co-ordination of industries and resources for the national security and welfare, to consist of the Secretaries of War, the Navy, Interior, Agriculture, Commerce, and Labour. It is the duty of this council "to supervise and direct investigations and make recommendations to the President and the heads of executive departments" as to the location and co-ordination of railways and highways for military purposes; "the utilisation of waterways; the mobilisation of military and naval resources; . . . the increase of domestic production of articles and materials essential to the support of armies and of the people during the interruption of foreign commerce;

the development of sea-going transportation; data as to . . . military supplies; . . . and the creation of relations which will render possible in time of need the immediate concentration and utilisation of the resources of the nation."

The Act also provided for an advisory commission of not more than seven persons, nominated by the council and appointed by the President, to serve without compensation.

In connection with this council there was organised an elaborate series of boards and committees. Directly under the council there have been an aircraft production board, a general munitions board, a munitions standards board, a commercial economy board, an interdepartmental committee, co-operative committees on purchase of army supplies, committees on shipping, women's defence work, and coal production, the national research council, and a section on co-operation with states.

Under the advisory commission there have been organised committees on transportation and communication, munitions, engineering and education, supplies, raw materials, labour, and medicine and surgery—and in connection with these a long list of divisional and sub-committees. The members of these committees are experienced business men, serving without compensation.

State and Local Organisations.—Official state councils of defence have been established in every state and in the District of Columbia. In twelve states, the councils have been created by Act of the legislature; and in the other states, councils have been appointed as official agents of the governor. The size, composition, and powers of these state councils vary widely. The number of members ranges from six or eight to 100 or more. In a few states they are composed entirely of state officials; in other states some state officers are members *ex officio*; but in most states most or all of the members are not public officials. About twenty states have made appropriations for these councils.

Forty states have reported a state-wide system of county or other local defence councils.

War Supplies.—A war industries board was created by the council of national defence on July 28, to act as a clearing-house for the war industry needs of the Government; determine the most effective ways of meeting them, and the best means and methods of increasing production, including the creation or extension of indus-

tries demanded by the emergency ; the sequence and relative urgency of the needs of the different Government services ; consider price factors and questions of priority, and, in the first instance, the industrial and labour aspects of problems involved, and general questions affecting the purchase of commodities. It also assumed the functions of the general munitions board. In connection with this board there was constituted a commission to arrange purchases in accordance with the general policies formulated and approved ; but in January 1918 a single surveyor of purchases was appointed, to centralise further the control over the purchase of supplies for the army.

Espionage and Foreign Trade.—One of the most important measures is the Act of June 15 " to punish acts of interference with the foreign relations, the neutrality and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes." This deals with espionage, vessels in United States ports, seizure of arms or other articles intended for export, unlawful exports, disturbance of foreign relations, passports, counterfeiting Government seals, search warrants, and the use of mails.

By executive order of June 21 the Secretary of Commerce was vested with the executive administration of the provisions relating to exports ; and an exports council was established, composed of the Secretaries of State, Agriculture, and Commerce and the Food Administrator, to formulate policies and make recommendations. Later an advisory board was established ; and in August this was constituted as an exports administrative board, with Mr. Vance McCormick as chairman, and representatives from the Departments of Agriculture and Commerce, the food administration and the shipping board, to issue export licences and carry out the export regulations. By proclamation the export of a considerable list of commodities was prohibited, except under licence.

Under the Trading with the Enemy Act of October 6, the powers of the President were further increased, by providing for the regulation of the foreign language press, the prohibition of trading with " enemies " and " allies of enemies," and authorising the temporary custody of property of " enemies " or " allies of enemies." To carry out the provisions of this Act, a war trade board has been established, which took the place of the exports administrative

board—the new board including representatives of the Secretaries of State, Treasury, Agriculture, and Commerce, the food administration and the shipping board. Appeals from the decisions of this board go to the war trade council, consisting of the heads of the departments represented on the board. The system of licences has been extended to imports and to the business of enemy and ally of enemy companies in the United States. A custodian of enemy property has been appointed.

Food and Fuel Regulation.—Two important Acts of August 10 deal with food supply problems. One provides for gathering authoritative information concerning the food supply, and authorises educational measures for increasing production, preventing waste, and promoting conservation. This Act is administered by the Secretary of Agriculture. The other Act confers, during the war, wide police powers for encouraging the production, conserving the supply and controlling the distribution of food products and fuel. This authorises the President to license the importation, manufacture, storage, mining, or distribution of any necessaries; to requisition, for the army or navy, foods, fuels, and other supplies, and any factory, packing house, oil pipe line, mine, or other plant; to purchase, store, and sell wheat, flour, meal, beans, and potatoes; to regulate the practices of exchanges or boards of trade; to fix a guaranteed price for wheat; to require producers of coal and coke to sell their products only to the United States, and to fix prices for such commodities. It also prohibits the use of foods, fruits, food materials, or feeds in the production of distilled spirits for beverage purposes; prohibits the importation of distilled spirits; and authorises the President to limit, regulate, or prohibit the use of food materials in the production of malt or vinous liquors for beverage purposes.

In carrying out this Act the President is authorised to make agreements, to create and use any agency or agencies, to utilise any department or agency of the government, and to co-ordinate their activities. Under this provision Mr. H. C. Hoover has been appointed as food commissioner, and Mr. H. A. Garfield as fuel administrator. Restrictions and regulations have been established for the use of wheat, flour, and fuel.

Railroad Control.—Under the leadership of Mr. Daniel Willard, President of the Baltimore and Ohio Railroad, acting in the capacity

of the transportation and communication committee of the council of national defence, plans for the more effective co-operation of the railroads were developed. A special committee of the American Railway Association was formed into a railroad war board to assist in this work, with other committees on telegraphs and telephones, electric railroad transportation, and cars and locomotives. The reduction of passenger train service released locomotives and train crews for freight service, and in other ways the railroad resources of the country were more efficiently employed, and a largely increased volume of traffic was handled.

Even with this improvement, the separate railroad companies were not able to meet the demands of war conditions; and at the end of December, by executive order of President Wilson, the control of the railroads was taken over by the Government, with Secretary of the Treasury Mr. W. G. McAdoo as director-general.

Shipping.—Under an Act of Congress of September 7, 1916, there was established a shipping board of five members, with broad powers to regulate rates and practices of carriers by water in foreign commerce or in inter-state commerce on the high seas or the great lakes. With the entrance of the United States into the war this board has taken over the general control of shipping.

In April 1917, an emergency fleet corporation was organised, capitalised at $50,000,000, subscribed by the Government, to provide for the construction of shipping. Under Act of May 12, 1917, ninety-nine German ships, with a gross tonnage of 635,406, which had been interned in United States ports, were taken over, and after being repaired, have been placed in service. In October the shipping board requisitioned all completed American ships of 2,500 tons or more; and it has commandeered all ships building in American yards. In December the emergency fleet corporation had under construction 426 ships commandeered for the Government and 884 ships on its own contracts, with a total tonnage of 3,000,000. About a million tons of shipping were completed by January 1, 1918; and several million tons additional are expected to be completed before the end of the year.

Ships commandeered by the Government are in most cases turned back to the owners to be operated by them, if not needed for military service or by allied governments. But the shipping board also

has an operating department of its own. It further fixes rates and determines problems of priority for the shipment of exports and imports.

Soldiers' and Sailors' Insurance.—By Act of October 6, 1917, Congress provided for relief and protection for the families and dependants of those in the military and naval service. For the support of the families and dependants of enlisted men, allotments of pay are withheld, and additional family allowances will be paid. For the protection of both officers and enlisted men and their dependants from the hazard of injury, disease, and death, monthly payments will be made for disability and death due to injury and disease incurred in the line of duty; and life insurance is offered, without medical examination, against total permanent disability and death, at normal peace rates of premium, without loading, the Government to bear the extra cost due to war service.

Committee on Public Information.—This committee, established by executive order on April 14, 1917, consists of the Secretaries of State, War, and Navy and Mr. George Creel, chairman, who is charged with the executive direction of its work. It was created to perform the combined functions of censorship and publicity; and has been organised into seventeen divisions: executive, civic and educational co-operation, official bulletin, speaking, four-minute men, news, syndicate features, films, pictures, newspapers, business management, labour publications, New York branch, women's war work, reference, art, and advertising. It publishes a daily official bulletin; and has issued 18,000,000 copies of fifteen different pamphlets in seven languages—including an annotated edition of the President's *War Message and Facts behind It*, *How the War came to America*, a national service handbook, a war cyclopedia, *German War Practices*, and a series of shorter pamphlets. It conducts speaking campaigns, maintains news service in European and American countries, and prepares and exhibits motion picture exhibits in the United States and foreign countries. It supervises the voluntary censorship of the newspaper and periodical press, and establishes rules and regulations for the cable censorship of press dispatches.

Under the provisions of the Trading with the Enemy Act, a censorship board was appointed in October, consisting of representatives of the Secretaries of War and the Navy, the Postmaster-General, the war trade board, and the chairman of the committee on public

information. It controls communication by mail, cable, radio, or vessel between the United States and foreign countries.

State Legislation.—In addition to the measures of the national government the legislatures of the several states have also been active. During the years 1916 and 1917 more than two hundred laws relating to war problems have been enacted in forty states. Twelve states passed laws creating state councils of defence; twenty-eight states have revised or made important amendments to their militia laws; and ten states have provided for a new force of home defence guards, to take the place of the militia called into the national service. Several states have provided for the registration of aliens, for a military census, and for military instruction in the schools. A number of states have passed laws relating to sedition, treason, syndicalism, and sabotage, and have prohibited the desecration or misuse of the national flag and the national anthem.

Other state laws have dealt with questions of food and fuel production, distribution, and conservation, with provisions for departments of markets and other agencies. Several states have passed laws for the relief of dependants of those in the military and naval service. A few states have prohibited the sale of intoxicating liquors near military camps; some have passed moratorium or stay laws, suspending suits against enlisted men; and a few have amended their banking and insurance laws to meet war conditions. A large number of miscellaneous laws have also been enacted.[1]

[1] *American Political Science Review*, xii. 78 (1918).

METHODS OF FOOD CONTROL IN WAR-TIME.

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A nation whose food supply is endangered by war is very frequently compared to a beleaguered city; but the comparison, although invaluable for propagandist purposes, is misleading rather than helpful as a guide to action. The governor of the fortress will at once adopt the full programme of "war socialism." He will schedule the existing food stocks and the possible production, take control of the whole at the source, and without excessive difficulty establish machinery to distribute such food as can be made available in whatever shares may be necessary. National food control is a vastly more difficult problem. It is conceivable that preparations might be made in peace time to permit of complete control of a nation's food supply in the event of war. In fact, however, not even Germany had made such preparations. The Food Controllers of Europe, whose activities have excited so much satisfaction in hostile countries and so little pleasure among their subjects, may without exception plead that their measures have necessarily been improvisation based on entirely inadequate information to meet a rapidly changing situation whose developments could not be foreseen. The result has been a multiplicity of emergency food legislative enactments through the mazes of which, in any country, only an expert can hope to pick his way with certainty. In July 1917 it was calculated that there were then in force in Germany 892 separate emergency laws, proclamations, and orders, relating solely to food, issued by the Imperial Government alone; this figure took no account of repealed enactments or of State and municipal legislation. A list of German Imperial war organisations for the control of food published in March 1917, contained the names of forty-five bodies solely concerned with food. The food legislation of other countries is hardly less complex.

The Forces operating in the Supply of Food.—For the purposes of a general discussion, however, certain guiding lines through the maze may be established. Under normal conditions a nation is fed by a process whose details no one person understands, but which is the result of the interplay of innumerable individual calculations of commercial self-interest, made in the light of long acquired experience. Agricultural production is largely governed by habit and is not immediately sensitive to changes of market conditions; manufacture and distribution are highly sensitive to fluctuations of demand. War disturbs the balance of the machine. It partially cripples it by the removal of necessary parts—by the withdrawal of labour, material, and directive factors. At the same time it diverts into new channels the driving force of the whole apparatus—which is profit—because as the total output ceases to be adequate to the total demand, not merely does the value of the whole rise, but the inter-relation of values is disturbed so that the machine naturally tends to operate more and more for the benefit of the social classes which have command of most money and to produce, not what is nationally essential, but what will yield the highest return. This, curiously enough, tends to be largely articles of luxury, as the effect of war is to inflate the circulation of money and increase the purchasing power of considerable sections of the population. At this stage Government interference becomes essential for two objects—to protect the national resources from premature exhaustion and to prevent actual starvation of the poor. The creation of a new machine better adapted to war conditions (which is the natural duty of the governor of a beleaguered fortress) is, however, beyond the power of any national Food Controller. He can do no more than seek to correct the aberrations and retard or accelerate the working of particular parts of the existing machinery. For this purpose he may seek to regulate its driving force, profit, by limiting or subsidising prices; he may restrict or prohibit particular operations and the production and consumption of particular articles; or he may take part of the machine into his own hands and endeavour to control its action. But all his measures must produce a disturbing effect which may extend far beyond the object which it was designed to secure.

The Reservation of Food Materials for Food.—The least dangerous of food control measures are those for the restriction of particular forms of production and consumption. Each belligerent country

has gradually established the principle of reservation of food materials for food. Important concessions have, however, necessarily been made to the claims of the munitions industries and of drink. Thus the failure of the 1917 German potato crop did not prevent the use of potatoes for technical spirit; the strict rationing of sugar in enemy countries is partly due to the use of large quantities for munitions; and it is probable that, though the German fats ration is only 2½ oz. per head per week, much edible fat is being used for munitions. Both Germany and Great Britain have ceased the distillation of potable spirit (at least for general consumption), but both still provide a limited amount of barley for beer. Even more difficult questions of policy arise where a foodstuff is capable of utilisation in two or more forms. The most serious conflict is between direct utilisation of agricultural produce and its utilisation for the maintenance of the national livestock. The former is claimed to be scientifically much the more economical, but it may be argued that the latter provides indispensable fat, and that preservation of at least the horned cattle and sheep stocks is an important *post bellum* interest. The policy of belligerent Governments has leaned on the whole to the former alternative; feeding of bread grain to animals is everywhere forbidden, and the list of prohibited fodders is of great length in most countries. But, when confronted with the impossibility of preventing livestock from receiving these foods if it is there to eat them, no Government has been prepared to reduce the livestock. Germany indeed in 1915 killed seven million pigs to prevent a potato famine which would never have arisen, and is at present talking of drastic reductions of her livestock, but the rationing of meat in Germany was introduced, and the present low ration (½ lb. per week) is enforced, to protect the livestock.

Control of Prices.—After necessary uses have been eliminated, and after the utmost has been achieved by propaganda for voluntary economy and the prevention of waste, a Food Controller has open to him only the two perilous courses of operation upon prices and assumption of direct control. Historically the former course has always been followed first, and has always led directly to the adoption of the latter. Government control of prices, except by way of subsidy, has never been popular either with business men or with political economists, and experience during the war has more than

confirmed their arguments. But the first sign of the effect of war upon an article is a rise in price accompanied by an agitation for the prevention of profiteering. The rise in price is the natural economic remedy for the shortage; it both tends to produce more of the article and delays its consumption. But it is cruelly hard upon individuals, and in war-time is not even certain to increase production. Its unchecked operation cannot be permitted. Profiteering is only a subsidiary, although it is a real and irritating factor. The rising market attracts speculative elements and the war releases capital and energy from other activities which seek employment in speculation in food. There is a limited justification for the defence, always put forward by any regular trade which is accused of profiteering, that the real sinners are (as was said in Germany) "the stockbrokers and actors and barbers" and *hoc genus omne* who have intruded from outside into the trade.

Horizontal Dealing.—The chief methods of direct attack upon profiteering which the war has produced have been the licensing of dealers and refusal of licences to persons not properly established in the trade before a certain date, or guilty of offences against the war regulations, and the prohibition of *horizontal dealing*, *i.e.* the process by which goods are raised in price by being passed from hand to hand without the performance of any economic service. The three enactments embodying this difficult legal conception are the German, which merely penalises any increasing of the price of necessaries by "improper chain dealing" (Unlauterer Kettenhandel); the Danish law which forbids more explicitly "trade profits arising from the sale of goods from producer to producer, importer to importer, wholesaler to wholesaler, or retailer to retailer," and the British Food Controller's Order against horizontal dealing. Like the British law against hoarding, all these three laws are remarkable for the vagueness of their definition of the crime. "Chain-dealing," for example, is a conception entirely unknown to German jurisprudence before the war. The best example of the offence is furnished by a transaction of a German war organisation—the War Company for Sauerkraut. This authority commandeered a stock of the article made by Görlitz Co-operative Society. The sauerkraut was then re-sold to a district distributive organisation; re-sold by the latter to the town of Görlitz; sold by the town of Görlitz to the Co-operative Society, in whose cellars it had lain all

the time ; and retailed by the society to the public. In this process it accumulated three unnecessary middleman profits and rose 82 per cent. in price.

Maximum Prices.—The war has seen some examples of mere minimum prices intended to promote production (*e.g.* enemy sugar beet prices) ; and many of the maximum prices fixed have been on a higher level than the ultimate price to the consumer, and have contained a Government subsidy to production ; but the commonest war measure of price control has been the maximum price pure and simple. All the governments have demanded from maximum prices more than they were capable of performing. They are serviceable for the elimination of unjustifiable profit, but by themselves they may actually aggravate trouble due to real shortage, because they increase the effective demand for the article and accelerate its consumption. Hence they lead logically to complete control and rationing of consumption. The same conclusion results from the difficulty of their enforcement, due to the fact that the victim of the overcharge must be treated as a party to the crime. A recent revelation in *Vorwärts* showed that every municipality of Greater Berlin had systematically paid excessive prices for all the agricultural produce bought by it for the past year. Germany, in fact, illustrates as well as any country the pitfalls and dilemmas which beset the fixing of maximum prices. Her first grain prices destroyed the proper distribution of grain by disregarding the cost of transport. Her attempts to fix prices only at one or two stages in the economic history of an article have shown that profits must be strictly regulated at every stage. For example, pig prices were originally fixed at the slaughter market, with the result that the whole supply was diverted direct from the stall to the curing factory and to the big consumers (hotels, munition canteens) ; and potato prices were fixed only for the producer and retailer, with the result that the wholesaler pocketed the whole margin and brought distribution to a standstill. Attempts to fix prices for one use of an article, or for one article in isolation, have diverted the material to unexpected employments. In one instance (apples) the German Government, with what was regarded as intolerable cynicism, confessed to having fixed maximum prices, not to protect the consumer, but to prevent sale except to Government organisations which could pay more. Finally, the maintenance of maximum prices unchanged or in a fixed

relationship to each other, although always announced as the unalterable determination of the Government, has not in any year proved practicable. Despite all difficulties, however, maximum prices, fixed as far as possible in the economically desirable interrelationship for all articles produced from the same material or by the same economic class, and controlling profits at all stages, remain a necessary weapon in the armoury of a Food Controller.

Price Supervision Bureaux.—An interesting attempt has been made in Germany to limit prices by a less rigid method, without penalising justifiable exceeding of the maximum. A Federal Council Order of July 23, 1915, penalises charging or payment on a sale of necessaries of a price " which having regard to all the circumstances of the case, and in particular to the state of the market, involves an excessive profit." The Courts have strained this vague definition so as practically to exclude all reference to current market prices, holding that the price charged must be such price as yields a reasonable profit to the individual seller on the individual article. Enforcement of this law has been made possible by the creation of a network of municipal Price Supervision Bureaux (*Preisprüfungsstellen*) representing producers, trade, expert opinion, and the consumers. These bodies publish standard prices, infringement of which is *prima facie* evidence of criminal profiteering, and they advise the Courts on particular cases. Austria and Hungary have imitated the German example. The operation of this German law is the subject of continual trade criticism, which is particularly severe upon the prejudice and ignorance of the Price Supervision Bureaux.

The highest form of food control is control of the article from the earliest stage at which it can be effectively reached down to its consumption by the public in the prescribed ration. It is undoubtedly to this end that other measures naturally lead as shortage becomes more acute.

The Embargo System.—The legal instrument which has been employed in Germany for the control of goods at the source is the highly flexible conception of the *Beschlagnahme* or embargo. Panegyrists of the alleged inventor, Herr Rathenau, claim rather boldly that it is a new conception in jurisprudence. Imposition of an embargo deprives the owner, not of the property in his goods, but of the right to dispose of them except in ways expressly permitted, and imposes

upon him the obligation of taking all reasonable care for their preservation. Certain methods of treatment and disposal are then permitted, so as to secure the desired end, viz. sale at maximum prices to a public authority, or to a special class of trader who in his turn may only sell in permitted quarters. In the case of food, however, sale is always to a public authority, and independent activity by wholesale dealers has almost wholly been suppressed. Expropriation is enforced if goods under embargo are not sold voluntarily, but nothing like a general expropriation of a foodstuff has taken place. The Government seeks rather to elicit produce from the farmers by manipulation of the maximum prices. The method of embargo is applied in Germany to every foodstuff except meat and fish, but its general use in the case of fresh fruit and vegetables involved enormous waste (especially of plums) in 1916, and it is not likely to be repeated. Austria-Hungary and Sweden use the same form of law. The differences in the methods of other countries, where the whole supply of an article is controlled at the source, are considerable as a matter of legal expression but not very great in practical effect. France, in the commencement of the present season, endeavoured to avoid both an embargo and extensive requisitioning of grain by taking power to direct to what quarters grain requiring transport by rail, motor, or barge should be consigned; but the machinery worked badly and has been replaced by a measure equivalent to the German embargo.

The method of embargo can be and is largely worked by mere Government or municipal authorities, which appoint the buying agents from the regular trade on a fixed commission basis. The whole grain and pulse crop in the Central Empires is thus administered, the mills being obliged to work for the authorities on fixed terms. The German Government, in establishing its grain control, ignored the possibility of syndicating the corn trade and utilising its capital and experience, and preferred to create, for purchase and distribution of the grain which was not reservable for local use, a public War Corn Company, whose capital (only partly paid up) is drawn mainly from public sources and which is financed largely by War Loan Bank advances. This decision was certainly in accordance with public opinion; it was repeated in the case of potatoes, vegetables, and fats. Many of the similar central German organisations, however, are compulsory syndicates, or co-operative buying

organisations, of the manufacturers or traders affected. They stand under complete Government control and are both purchasing and distributive organisations and also regulative authorities which release goods for sale and fix prices. An article can in some cases be sufficiently controlled if at one stage in its history it must pass through the hands of such an organisation. Fish and meat are examples of non-manufactured articles which can most easily be treated in this way. Germany has now an excellent system for the distribution of sea fish, based on compulsory syndication of all the fish trading companies to form a score of war companies, each of which has the monopoly of the purchase of the catch in particular parts of the coast and the duty of supplying the local authorities of allocated districts or the wholesalers nominated by them. Meat cannot well be dealt with at an earlier stage than the slaughter market. Germany has accordingly vested the monopoly of the purchase of cattle, sheep, and pigs in compulsory syndicates of all the slaughter dealers, which serve allocated local authorities or butchers' committees established by them, buying (for the most part) as syndicates on a commission basis, and using their members as mere buying agents. This system presents analogies to the control of slaughter animals at the markets and the organisation of live-stock dealers' associations which is in process of establishment in this country. The possibilities of compulsory syndication of manufacture require no illustration. The process has been carried very far by all the Central Empires.

The Control of Food Imports.—Not much space can be afforded here to the control of food imports by belligerent countries. The Central Powers found themselves in 1915–16 in the same position on the neutral markets open to them as was recently occupied by the Allies on the world market. Their importers were competing wildly with one another, and with foreign buyers, for supplies which were severely restricted both by natural causes and by the action of the home Governments. The inevitable result in both cases has been Government monopolisation of all food imports. The criticism which has resulted has also been in the same strain in both cases: valuable imports are alleged to have been lost by the folly of the Government monopoly. The Central Purchasing Company, which monopolises all imports for enemy countries, is the most unpopular of all German war organisations.

Municipal Trading in Food.—Control of an article at the source is the preliminary to distribution on some principle of rationing throughout the country. The basis must in some form be allocation of supplies to districts according to population, but national distribution systems fall into two clearly marked classes according as the function of the local authority is commercial or purely regulative. Among the Allies the latter principle prevails; the local authority as a rule merely controls trade purchases and rations consumption, but does not to any great extent buy food for its district. Enemy countries have founded rationing upon municipal trading in food. In Germany, in particular, the local authority is the primary wholesaler of rationed foods; some part of the supply it may allow to be sold to local wholesalers or associations of wholesalers, but it has always the right to buy its district's quota for its own account, and this right is exercised in the majority of cases. Municipal trading was the basis of the grain and flour rationing from the start. The way to further extensions of the system was paved by the immense activity of the German towns in 1914–15 in the purchase of foods which were becoming scarce, in the course of which most towns formed or became partners in municipal food companies, whose machinery was available later for rationing purposes. The injury thus done to wholesale interests is regretted but defended as unavoidable by the Imperial Government. German towns have only to a limited extent substituted municipal shops for the ordinary retailers, but they have comprehensive powers to compel retailers to group themselves for the receipt of supplies.

The Ticket System.—There is in principle no great mystery about the ticket system, which is the chief outward and visible sign of food control. It is a device for securing an automatic check upon distribution and consumption. Nothing could be more futile than an attempt to ration an article without such a check. The pressure upon a rationing system, the tendency to evasion of regulations contrary to all normal practice even by patriotic and law-abiding persons, cannot be exaggerated. Legally the food ticket is a licence to its holder to buy up to a fixed maximum—sometimes at a particular shop only. It has its counterpart higher up in the scale of distribution in the retailer's, wholesaler's, and manufacturer's purchasing voucher. The right should be automatically extinguished upon its exercise, and it is for this reason that the card with detach-

able coupons is almost universally preferred to the card which is merely marked by the seller. As a class, sellers cannot be trusted to sell only on cards or to mark cards except under compulsion. The simplest form of such compulsion is to apportion supplies to them in proportion to the number of detachable coupons which they can collect from the public. If, indeed, a retailer is supplied in proportion to the number of his registered customers, it is in his interest to cancel their cards in order to secure that his supplies are properly distributed among them, but the check is neither so automatic nor so secure. Unless control by the supervising authority is very vigilant, some retailers may oversell to some customers—the more so as all the registered customers may not buy the full ration. Food cards are invariably non-transferable, except among members of the same household. The reason for this provision is twofold. It secures a saving of food on every case in which the full ration is not required, and so permits a higher level of ration than would be possible if the tickets could be freely sold; and it is a safeguard against the danger that the economically weak will be bullied or cajoled into selling their right to food, a danger which has been strongly marked in Germany. Whether a simple untied card with coupons will suffice to regulate distribution is a pure question of the degree of scarcity. It has been found sufficient for bread in Germany, Sweden, Switzerland, Holland, Denmark, Norway, and Italy, and France is now adopting the same method; on the other hand it has broken down for bread in Austria. Its success depends upon the possibility of allowing a sufficient margin to retailers, so that the card holder can be reasonably certain of buying his ration at a convenient shop. Where supplies have been too short to permit of such a margin, the more exact method of distribution which is secured by tying customers to particular shops has everywhere proved necessary. Incidentally such registration provides a check upon duplication of the ration card circulation, as it impedes the easy use of lost or stolen cards, but the chief motive for its adoption has been the elimination of margins and the prevention of queues. In Germany a variant of the registration method is widely practised by which the customer orders his ration in advance each week, or on each occasion of a distribution of the article, and thereby registers with the retailer, who receives only enough to satisfy his advance orders. At the expense of further trouble to the public

this method secures the maximum of accuracy in distribution and emancipates the public from the tyranny of the retailer. The other anti-queue method which has found favour in enemy countries is for the retailer to allocate serial numbers to his customers and serve each section between particular hours.

The Grading of Rations.—The possibility of grading rations according to physiological need and social habit is limited by the administrative possibilities of differentiating between different classes and of handling different kinds of cards. These are not unlimited, and the friction involved in differentiation has caused the supplementary card to be described in Germany as the "plague of the ticket system." The distinctions normally adopted are between persons on heavy work, ordinary manual workers, sedentary adults, and children. Germany, Switzerland, and France supply examples of differentiation by income. Invalids are often given special allowances of particular foods. France has proposed to distinguish between the sexes in rationing bread, but has not yet brought her very complicated scale into operation. This distinction is probably unwise. The facts that food is mostly consumed in households whose members pool their rations, and that the poorer breadwinners mostly have supplementary rations of bread and potatoes, when these foods are rationed, takes very much of its force from the argument that rationing by cards involves an objectionable levelling up or down of individual consumption of each rationed food.

The Success of Food Control.—Has food control proved a success ? The answer must be both yes and no ! As a war measure this gigantic experiment in impromptu socialism has in enemy countries achieved results which could not have been anticipated, and has permitted active continuation of hostilities upon a supply of nourishment which for the past year and more has been barely half to two-thirds of what physiologically, and *a fortiori* economically, would before the war have been considered as the minimum. But the system could only have been tolerated as a war measure ; its continuance as part of the peace organisation of national life is unthinkable.

THE INTERNATIONAL POSITION OF SPITZBERGEN.

[*Contributed by* J. E. G. DE MONTMORENCY, ESQ., M.A., LL.B.]

The issue of the *American Journal of International Law* for October 1917 contains a valuable article from the pen of Mr. Robert Lansing, prepared while he was an editor of the *Journal* and before he became Secretary of State for War. It is entitled "A Unique International Problem" and deals with "the extraordinary political situation of the archipelago of Spitzbergen, lying about four hundred miles north of the Norwegian coast," which was discussed at an international conference at Christiania just before the war and left unsolved. These islands are nearly 50,000 square miles in area and before the year 1900 were uninhabited and only visited by hunters and whalers. About the year 1900 an American company was formed to develop coal deposits known to exist in West Spitzbergen and in fact "a considerable investment was made, shafts were sunk, and machinery and buildings erected." Persons of other nationality, in view of the apparent value of the fields, "began to make claims to the coal-bearing area, asserting their intention to engage in the industry. Those conflicting claims were the cause of attention being called to the political situation of the islands." The economic significance of the archipelago is described in letters to *The Times* of March 11 and March 12, 18, which set out the various claimants to the great mineral wealth of the area. In a leading article of March 11 *The Times* states that in one version of the treaties of Brest-Litovsk Germany and Russia as represented by the Bolshevists propose to share the lands. No nation has ever occupied them, claimed them, or asserted sovereignty over them. Spitzbergen is a *Terra Nullius*, and no Power is to-day in a position to claim this vast area. Mr. Lansing considers the political position one "to which a parallel

will be hard to find in modern times." Presumably, however, the same problem may arise in respect to certain areas in the Antarctic region even if the whole of the Arctic region is reduced, as apparently it is not, into political possession. However, it would be difficult to indicate, though it will sooner or later become necessary to indicate, the limits of the Arctic sovereignty of Great Britain and Denmark. Mr. Lansing states as follows the problems that trouble him and that left the international conference helpless:

> If this [mining] population increased and persons of different nationalities settled in the islands, laying claim to lands already claimed by others, how could these people be governed, and to what authority could they appeal to settle their conflicting claims and to protect them in the enjoyment of their rights? . . . Admitting that it is necessary to establish some form of government in the archipelago, the question presented is, upon what theory can a government be established over a territory owned by no nation? What basis is there for the exercise of sovereign rights? The situation is one that is entirely novel. The records of history will be searched in vain for precedents. The common conception of government carries with it the idea of a State, and that idea seems to be inseparable from territory and territorial sovereignty; in fact it is almost impossible to think of a government without thinking of a territory over which it operates. Now in Spitzbergen the proposition is to establish a government which can exercise its functions within a territory over which it has no sovereign powers, and which derives no authority from territorial dominion, for none exists. Can it be done? And if so, how can it be done?

It will be convenient to refer to the solution of this question as seen by Mr. Lansing before proposing what may seem to be the two simple obvious and inevitable solutions.

Mr. Lansing holds that "political sovereignty might exist without reference to the possession of territorial sovereignty" if the persons subject to that sovereignty are particularised by *locus* and by allegiance. Thus "sovereign authority might be exercised over a certain class of persons within a particular area, without regard to the right of sovereignty over the area itself." There is in fact nothing new in this notion, since it has always operated, in practice at any rate, under both the Roman and the British Empires. The Roman carried his law with him into the desert, and so does the Briton to-day. The English common law is a garment that can only be stripped

from an Englishman by competent sovereign authority. An Englishman in a *Terra Nullius* such as Spitzbergen keeps out the cold with the English common law. An Englishman and Englishwoman could contract [1] a marriage in Spitzbergen in the fashion of their forefathers before the days when Parliament regulated the forms of English marriage. Therefore so far as English people are concerned Spitzbergen is not a land without any order. Yet it has to be admitted that the question of absolute rights in immovable property in the islands is not fully solved by the peripatetic character of the English common law. Nor does Mr. Lansing's solution solve that question. He says that the institution of a government of the character indicated above, "based solely upon the political *status* of persons, would seem to offer a possible solution to the puzzling situation of affairs as they now exist in Spitzbergen." But Mr. Lansing admits that if "there should not be substantial unanimity by all the Powers interested in Spitzbergen in the delegation of their political sovereignties, a government founded on this theory would be inadequate to accomplish the purposes for which it is created."

This government clothed with powers delegated by the sovereigns to whom the various settlers owe allegiance would have to deal with (1) public order and safety; (2) contractual relations; (3) the use of land. Mr. Lansing feels that the first two of these subjects may be brought within the scope of political sovereignty. No theory as to Spitzbergen, indeed, is needed for that. The sovereign of each person will see that that person does not suffer unjustly at the hands of any person owning another allegiance. But, says Mr. Lansing, "the use of land seems to be peculiarly under the operation of territorial sovereignty." Now Mr. Lansing premises the existence of political sovereignty only. How then could such sovereignty secure the necessary control of the use of the land? We are told that in these circumstances there cannot be a "real right" in land, but that control must be exercised by control over the users of the land:

> Ownership in the case of land in Spitzbergen could not, therefore, exist. All persons cannot be excluded. Only those persons could be excluded whose governments have conferred upon the irregular government the right to exclude them. Exclusive use and occupancy is lacking,

[1] *Pace* R. V. Millis, [1844] 10 Cl. and Fin. 534 H.L.

and so land in Spitzbergen cannot, in the true sense, be owned. . . . In the case of ownership, the right of exclusion is complete and is derived from exclusive control of the land; in the case of the right acquired in Spitzbergen, the right of exclusion would be incomplete and would be derived from the delegated power to control persons of certain nationalities who might otherwise enter upon the land. . . . International unanimity is fundamental to any plan for the efficient control of human action in Spitzbergen. On that depends the practicability of instituting a government at all. To secure such unanimity will be no easy task; it is the obstacle which will have to be overcome in order to ensure public control in the islands.

The difficulties raised by Mr. Lansing are very real, but it is possible even on these premises to adopt the following view: that the political sovereign could say, and, what is more important, would say to other nationals who propose to enter upon lands that are in actual if not legal occupation, "If you attempt to enter on these lands we shall instruct the present occupants to resist your entry and we shall if necessary support that resistance It is true that these lands are *Terra Nullius* and common to mankind; but in the same way that Roman law recognised the temporary physical occupation of the seashore and protected it, so we recognise and shall protect the temporary physical occupation of land in Spitzbergen. If the occupation ceases the land will again become the subject of unrestricted entry, since there is no absolute property in the land. But until occupation ceases we shall protect that occupation provided that it is a *bona fide* occupation and one that the *jus gentium* would support." It is difficult to see any answer to this position and the position remains sound without any combined political sovereignty. The British Government could quite well adopt this attitude towards any temporary occupation of land in the Spitzbergen group of islands by a British subject; and so could any other government in the case of its own nationals. From this point of view the international problem of Spitzbergen seems soluble enough. But it is a solution that affords no final settlement of the position in Spitzbergen and places similarly situated. The only final settlement would be secured by a declaration of territorial and political sovereignty by the persons who are permanently resident in Spitzbergen. It is submitted that these persons, acting through a duly elected legislative and executive body, could form a

new and independent State which would have a right to immediate recognition. As a State it must be prepared to exercise the duties as well as the rights of sovereignty; to exercise judicial as well as executive and legislative functions and must enable "real rights" on land to come into existence. No doubt the test as to the right to create a new State would be the test as to domicil. But persons actually domiciled in the islands would, there can be little doubt, have the right to assent and exercise full sovereignty. No doubt the question might be raised whether recognition of sovereignty confers on the sovereign the right of eminent domain and the power to grant real rights in land. But, whether it does or not, complete sovereignty could after recognition assume that power by direct legislative act.

There is a further point. If an effective sovereignty is created in the Spitzbergen Archipelago by persons domiciled in the islands, that sovereign power will have the right, in the exercise of its unrestricted free will, to adopt any relations that seem fitting to it with other sovereign Powers. It may, for instance, if it chooses place itself by treaty under the protection or guarantee of another Power; it may even coalesce with another Power. Such a process of development seems indeed not improbable and suggests dangers that may be difficult to guard against. In some such way Germany, for instance, might acquire the sovereignty over these regions and create new perils for Northern Europe. It is, however, certain that no arrangement with Russia could confer upon Germany any sovereign rights, and that any treaty to that effect at Brest-Litovsk is wholly inoperative.

PROPOSALS FOR AN IMPERIAL PATENT LAW.

[*Contributed by* J. W. Gordon, Esq., K.C.]

For the purpose of granting patents, and administering patent law, the British Empire is divided into some forty-five independent parts. British patent law has been adopted as the basis of patent legislation in almost all these divisions, but British patent law has been formulated with exclusive regard to the requirements of the United Kingdom and is in fact wholly unsuitable for application to a community so various and so widely extended as the peoples of the British Empire. The resulting anomaly and confusion may be illustrated by a few leading facts.

The Royal Prerogative.—No patent grant available for the whole of the British Empire is obtainable unless in the completely obsolete form of a prerogative grant under the great seal. Down to 1852 grants of patent right in respect of inventions were occasionally made in this form. In 1852 an attempt was made to systematise that procedure. The attempt was not very successful, and although the Royal prerogative has remained untouched by subsequent Patent Acts, the course of events and the movement of opinion in the overseas parts of the Empire has made any exercise of this prerogative right practically impossible. The main proposal is to restore this lapsed authority under the form of a statutable grant.

British Subjects treated as Aliens.—By the Act of 1883 the Dominions of the Crown were relegated to the position of foreign countries and made independent parties to the International Convention entered into at the time by the British Government with certain foreign States. The result is that a British subject domiciled in any of the Dominions of the Crown enjoys no advantage over an alien in a foreign realm when applying for a British patent and, reciprocally, an Englishman enjoys no advantage over a foreigner when applying for a patent in any of H.M. Dominions overseas.

Lack of Uniformity in Patent Legislation.—Certain of the Dominions have incorporated in their patent legislation various clauses borrowed from the American or other codes of patent law, with the result that in those countries the patent law differs in certain important particulars from the patent law of the mother country, and it is therefore impossible to speak of a patent law of the Empire in any strict sense of the word. In fact, of all the branches of commercial law it may be doubted whether any varies more from place to place within the dominions of the Crown than the patent law. Concerted measures will be necessary if that coherence which should distinguish commercial law is to be acquired by the patent law of the British Empire.

Overlapping of Procedure in obtaining Patents.—Beside the inconvenient divergencies to which reference has been made in the last paragraph, equally inconvenient overlapping and multiplication of procedure marks the patent law of the British Empire. To take one illustration only. The practice of examining applications for novelty has been introduced by eight of the self-governing colonies, with the result that when a patent has to be taken out in all those different parts of the Empire the same examination is perfunctorily made over and over again. No useful purpose whatever is served by this multiplied labour, which merely aggravates the cost of obtaining the grant.

Cost of Empire Patent Rights.—The official fees preliminary to the grant of a patent amount in the United Kingdom to £5, and this, when a patent agent is employed, works out usually to something over double that sum as the total cost. For a similar grant throughout the British Empire the official charges amount to a total of £240, to which a more than equal sum must be added to cover the various patent agents' fees. The relation between these two sums is itself anomalous enough, but the anomaly is more easily understood if it be added that the whole official cost of obtaining patent rights on the continent of Europe—including such highly industrialised communities as France, Italy, the German Empire, Austria, and Switzerland—amounts to something under £35. The addition for patent agents' fees is a fraction only of what is chargeable in connection with a full British Empire application.

The situation, so far as the British Empire is concerned, is very much to-day what it was in relation to the United Kingdom prior

to the passing of the Patent Law Amendment Act of 1852. Before that date the three kingdoms had separate procedures for making patent grants, precisely as the separate Dominions of the Crown have to-day, and a patent to extend to the whole realm cost over £300 in official fees before sealed documents could be secured. By consolidating the three Patent Offices the Legislature of that date reduced the official fees from £300 to £20 and facilitated the issue of patents to an extent which was probably at least of equal importance to patentees. By later legislation the £20 has been reduced, as above stated, to £5. The opportunity for a very much more important operation of the same kind is now presented by the condition of patent law and its administration in the British Empire, and it is hoped that an attempt will be made to accomplish in this direction something similar to that which was effected in 1852, but upon the much more extended scale which the British Empire of to-day offers, as compared with the United Kingdom of that earlier date.

Proposed Scheme of Reform.—These defects might be remedied in part by the appointment of a Board of Commissioners for the British Empire based on the analogy of the Commissioners of the Great Seal Patent Office established in 1852. These Commissioners would consist of *ex officio* members, being the Law Officers of the British Realm and Dominions, to whom the Crown would have power to add specially appointed Commissioners, one or more, to assist and supplement the work of the Law Officers in the executive branch of the Department. The various Law Officers already exercise a certain controlling authority over the patent offices by way of appellate jurisdiction and advisory authority. But the practice of the Patent Office has become very confused in recent years by reason of the unwillingness of the Law Officers, already overworked in the more important branches of their departments, to accept new responsibilities in connection with the administration of patent law. Hence, by recent legislation appeals from certain decisions of the Patent Office have been directed not to the Law Officers, but, in some cases, to the Board of Trade and in other cases to the High Court. Appeals in this form are highly inconvenient for two different reasons. The Board of Trade has no judicial machinery at its disposal. In many cases the appeal to that tribunal is simply passed on to the High Court. Appeals to the High Court are incon-

venient, in their turn, because the litigious business transacted at the Patent Office is there conducted by advocates who have no *locus standi* in the High Court and they are unable themselves to follow on appeal proceedings which they have conducted at the Patent Office. This procedure might be simplified by transferring the appellate jurisdiction in respect of all matters dealt with at the Patent Office to the Commissioners. The addition of Commissioners specially appointed would enable this transfer to be effected without unduly increasing the work thrown upon the Law Officers of the Crown.

Members of the Commission would be appointed for all the various parts of the Empire comprised within the scheme. It would thus be possible for Law Officers of the Dominions, when visiting London, to sit upon appeals here and, similarly, Commissioners from London or other parts when visiting the Dominions would be able to sit with the local Commissioners in their Courts. It is to be hoped that in this way the assimilation of patent law practice throughout the British Empire would be facilitated and the work of the Commissioners considerably lightened. It is one of the inconveniences of the existing system that a newly appointed Law Officer, succeeding to his duties as the appellate tribunal from the Patent Office, often finds himself dealing with an unfamiliar practice and cannot feel " at home " in his new post until a certain amount of experience has familiarised him with the system which he is called upon to administer. From this cause, as also because Patent Office appeals form only a subordinate part of the Law Officer's duties, the work sometimes is subjected to great delay and much inconvenience is caused to applicants for patents, and others, when their appeals are held up, sometimes for many months, in this way. The assistance of Commissioners who do not change office with the Ministry would greatly facilitate the work of the Law Officers at such conjunctures. Furthermore, the fact that a Commissioner from some other locality could be invited to pay a visit whenever his assistance would be serviceable to a local Commissioner would operate in a similar manner and tend to secure promptitude and continuity in the appellate work of the Patent Offices throughout the Empire.

Form of the Grant.—The second and even more important half of the remedy relates to the form of the grant itself. This presents greater difficulty, because it is not possible to form it upon the legis-

lation of 1852. The scheme then adopted had no great success at that time and would have no chance of even being adopted by the legislatures concerned at the present day. Something new must now be devised.

The most obvious suggestion is, of course, the granting of power to some Imperial authority to make an Imperial patent grant. But that can be seen on scrutiny to contain no promise of any valuable result. The cost would be almost prohibitive and the demand in consequence inconsiderably small, unless the Colonial Govenments could be persuaded to sacrifice official fees. In any case a grant comprehensive of the whole British Empire would be a more comprehensive grant than any one inventor wants, because no inventor ever plans to exploit his invention in all quarters and all climates of the world and amid communities of all possible stages of industrial development. The draughtsman of 1852 was undoubtedly right when he gave to the Imperial patent grant not *ipso facto* currency in every part of the British Empire, but potential currency, a potentiality which was turned into actuality by local registration. The shortcomings of that scheme were that it was not reciprocal, a grant made in one of the Colonies did not confer the right to registration in the United Kingdom, and that the measures necessary to an equitable extension by registration to one of the Colonies of a grant originated in the mother country were not worked out. Too much was taken for granted and left to chance.

A more promising project would be one based upon the analogy of the International Conventions and the compulsory licensing clauses of the Act of 1883. Under the International Convention the application for a patent in the British Isles, or in any one of the principal dependencies of the British Crown, carries with it the right to apply for a similar grant in any or all of the countries comprised in the Convention and, for a period of twelve months, to claim priority on the basis of the date of the original application over all other applicants. The arrangement is one that produces a certain amount of hardship and would on that account be unbearable if the term during which the first applicant's privilege of priority endures were not strictly limited and short. Any enlargement of the term would necessitate a corresponding modification of the nature of the privilege. Such a modification has, in fact, been introduced, for a different

purpose, in the form of the compulsory licence, and it is well worth considering whether a combination of these two expedients may not contain the promise of a solution of the present problem.

In outline the proposed solution may be sketched as follows: Every grant of a patent made anywhere in the King's dominions should carry with it the right of registration in any other part of the King's dominions, the grant, when registered, to take effect for the residue of the term of the original grant as if it had been originally granted at the original date in the territory for which it is registered. In other words, the owner of a patent in any part of the British Empire will be entitled to take a patent in the same terms in any other part of the British Empire, the new grant dating back to the date of the mother patent. But to avoid intolerable hardship, in the way of disturbing established business, such ante-dated grants would confer no right to ask for an injunction to restrain infringement, but only for damages in an action brought to enforce the patent right. Furthermore, to prevent the oppressive use of the right to damages the rule should be established that nominal damages, and no costs, would be awarded in a case in which the patentee failed to show that the infringer had actually himself benefited by the action taken by the patentee in exploitation of his patent rights.

A couple of illustrations will serve to show how such a system would work:

Case 1.—A patentee has invented an improved electric torch and has made a great commercial success of it in Great Britain and in Australia, where he has business connections. But he has never done any business with Canada and his electric torch has not, in fact, found its way into that country. After five years of successful working along his own lines he meets with an enterprising Canadian who is willing to establish the manufacture in Canada if he can obtain the necessary patent rights. The English patentee applies in Canada; obtains a grant for nine years there; assigns his new patent to the Canadian negotiator, who establishes a new industry in Canada as an offshoot from the British manufacture. The Canadian patentee, since he does not interfere with any existing trade, has a clear field to a patent right which is just as valuable as if the original application for a grant had been made in Canada. This is, clearly, a most natural way of developing industry within

the Empire and it is a mode for which our existing institutions provide no kind of opportunity.

Case 2.—Let the facts be supposed to be the same as in the preceding case save that it turns out that in Winnipeg a small electrician has been working at the torch with small capital and small success. Still he has made a business in a small way and he cannot be restrained from continuing it. The patentee offers him a licence, but as the parties cannot agree to terms they litigate. How, in a case like that, would the scheme work out ? In the first place, the Court would settle equitable terms of a compulsory licence. These would, probably, amount to a free licence in respect to what may be called the licensee's own trade, estimated according to its developments down to date, and a reasonable royalty on all additional business, such as might fairly be attributed to a benefit resulting to the established man from the advertisements issued and the market created by the patentee, whom we may suppose to have taken the business up with energy. The distribution of profits along these lines would involve no more difficult questions than those raised by the present system of granting compulsory licences, and when once the new system was well established parties would generally agree terms between themselves, and in that way the system would tend to become automatic in its working.

Many other cases suggest themselves for consideration, but it is perhaps unnecessary to discuss them in detail here. The general principle which covers all the solutions is that an extended grant would confer not a privilege of unqualified monopoly, enforceable by an injunction, but a limited privilege which could only be asserted by a patentee who showed that he was giving the public the benefit of the patented invention in an actual and publicly available form and was prepared, in doing so, to work in co-operation—it might be competitive co-operation—with other manufacturers. It is a return to the original idea that the patentee is a craftsman and the invention is his craft, and it puts him on a footing similar to that of electric lighting, tramway and other undertakers who, on condition of carrying new projects of public utility into operation, are entrusted with the privileges and authority necessary to safeguard their capital and put them in a position to discharge the responsibilities towards the public which they have undertaken. This is the essential principle and the ultimate justification of all systems for the pro-

tection of new inventions by patent rights. Its clear recognition would do much to reduce the complexity and clear away the anomalies of patent law and to point out the foundations upon which an Imperial system, worthy of the British Empire, might be built up.

The complete elaboration of any such scheme would require the co-operation of the self-governing Dominions of the Crown and local legislation in all parts of the British Empire to render it effective, and the writer would welcome comments or criticisms with a view to improvement of the proposal from the point of view of any of the numerous interests liable to be affected by the proposed legislation.

A PLAN FOR ORGANISING THE LEAGUE OF NATIONS.

[*Contributed by* THEODORE MARBURG, ESQ., M.A., LL.D.]

IN their masterly reply to President Wilson, January 10, 1917, the Allies committed themselves formally and officially to a League of Nations to discourage future wars. This portentous step once taken, manifestly the next important thing is to find out what kind of a League they will accept. Now, the most direct way in which to attack that problem is to frame an actual Draft Convention for their consideration. With this object in view, a private Study Group composed of American jurists and publicists has been at work on such a Draft Convention for the past year. They have considered the subject at ten meetings of the principal committee, supplemented by serious study by sub-committees. It is thought useful to give out the results of their labours at this time. The Draft Convention is based on the programme of the League to Enforce Peace, the principal aim of which is to compel inquiry before nations are allowed to go to war. The States of the League agree to make war, swift and immediate, on any nation which violates this fundamental provision.

Ministry.—The chief executive organ of the League is a Ministry of five, appointed out of, and by, an International Council and responsible to, and removable by, the Council. The executive powers of the Council are vested in this Ministry, which shall, in fact, possess all the powers of the Council when the latter is not in session, save one, namely, the power to make laws for the League. The Ministry is to keep a close watch on international developments with a view to forestalling difficulties. While having no power to interfere in the internal affairs of a State, it may offer its own services or those of any tribunal of the League in order to prevent internal disturbances from leading to international complications. It may itself entertain complaints or initiate investigations or may

pass up questions to the Council or the Court, or to any of the existing institutions at the Hague, provided that the parties to the dispute, if they so elect, may themselves designate the tribunal to which the dispute is to be referred.

It will be observed that there is no idea of ignoring the existing institutions at the Hague, so highly useful; on the contrary, the League will lean upon them as much as possible and co-operate in developing them.

Permanent session is prescribed for the Ministry. This means that we shall have sitting constantly at the Hague five men, presumably of international reputation—preferably men who have held important office—always in intimate contact and conference, keeping close watch on international developments, and ready at all times to act on a moment's notice. They would necessarily acquire an exceptional knowledge of international conditions and would speak with authority. Who can measure the far-reaching results of such an institution?

When, on the recommendation of the International Council, the use of military force shall have been determined by favourable action on the part of the States of the League known as the Great Powers, the Ministry shall proceed to appoint a War Council and take such other steps as are necessary to carry into execution the provisions of the treaty.

International Court.—When it was suggested to home and foreign jurists that a Court on the lines of the Court of Arbitral Justice, accepted in principle by the Second Hague Conference, was the institution required by the League, objection was made that the provisions in the Hague Convention were not broad enough and that the Court proposed in that convention would not meet the needs of the League. The question was accordingly gone into afresh, with the result that a Court of larger powers is here planned. The Court is to consist of fifteen judges, no two of whom "shall be connected with any one country either by birth, or as citizen or subject." But they may be taken from States without, as well as within, the League. They are to reside permanently at the seat of the Court, which is fixed at the Hague, so that the world may have the benefit of the constant association of these men of kindred aims and duties. The appointments are for life, with retirement at the age of seventy on pension.

It will be remembered that the Hague Convention found it impossible to reach an agreement on the method of appointing the judges for the Court of Arbitral Justice. Agreement on the constitution of the Prize Court by which the eight Great Powers were each to have a permanent judge, while the balance of the thirty-six States participating in the Second Hague Conference were to have only seven judges representing them by rota, was made possible by the fact that the smaller States have insignificant mercantile marines and were not concerned over the questions likely to come before a Prize Court. When it came to the matter of the composition of a Court of Justice, however, the smaller States manifested a very lively interest and insisted on having each its own representative on the Court. This would have produced a Judicial Assembly instead of a Court and was manifestly unpractical.

The present Draft Convention endeavours to solve this difficult problem through the instrumentality of an Assembly of Judicial Electors. Each State of the League is entitled to three electors, appointed in such manner as it may determine. They are to meet at the Hague on a given day after nine Powers have ratified the convention and shall proceed to elect the judges of the Court from among candidates nominated either by the electors themselves or by the States of the League. A preferential system of voting may be established; if not, the voting shall be by absolute majority rule. On this subject it may be said that while the Great Powers, having more at stake, are much more concerned with the successful and impartial functioning of the Court than the smaller Powers, there is no reason why the Court, chosen in the manner indicated, should not prove highly successful and therefore satisfactory to the Great Powers. This system, it will be noted, avoids direct appointment; and impartiality of decisions is further favoured by the provision that no judge shall sit in a matter "in which a State whereof he is a native or citizen or subject is a litigant." The competence of the Court extends to disputes of a justiciable nature arising between States whether or not members of the League, to disputes between corporations or individuals on the one side or States on the other, and even to disputes between corporations and individuals provided the dispute is of international consequence. It is for the Court itself to determine whether a dispute brought before it is justiciable.

"The doctrines of law recognised and applied by the International Court shall be those which in or under future conventions may be provided by the States of the League or those which may be agreed upon by the very litigants; and in the absence of such general provision or special agreement the Court shall follow its own theory of justice except in so far as doctrines have been established by general international law or have been embodied in the Hague Convention of 1907."

Provision is made for written decrees, accompanied by written opinions, which shall specify "what judges agree with it, what judges concur in the decree on other grounds, and what judges dissent."

One of the most far-reaching and potent powers granted the Court is that of injunction. The Court is the only organ of the League which can actually issue such injunction, but it shall also issue it, for reason, on application of one of two other organs of the League, namely, the Council of Conciliation or the Ministry; and these latter may apply for it in connection with matters pending before any international tribunal even though these tribunals be not organs of the League. Thus, in cases before the Permanent Court of Arbitration at the Hague, before the International Commission of Inquiry, or before an arbitration specially instituted, the States of the League may secure themselves, pending the inquiry, against continuing injury or possible future injury which would be irreparable or which would impair the value of the tribunal's prospective decision. Such a provision does not impair the principle that the States of the League can bind only themselves by the agreement, because, while the injunction extends to tribunals other than their own, it applies only to States of the League, which manifestly may provide by treaty any rules which they see fit to provide. This power of injunction will prove even more valuable in non-justiciable cases than in cases which are within the jurisdiction of the Court, for it is the former class of cases, namely, conflicts of political policy, which give rise to war. Such conflicts often involve momentous issues, pending inquiry into which a country would want to be made secure against continuing and possibly irreparable injury.

International Council.—The International Council is to consist of three members from each of the Great Powers that may become

States of the League and one member from each of the secondary Powers. They are to be direct representatives of the appointing State and recallable at its pleasure. It is presumed that they will be in close contact with the Foreign Office of the appointing State, in order both to keep it informed and, themselves, to receive instructions from it. The unanimity rule which obtained in the Hague Conferences is abandoned ; resolutions of the Council are by absolute majority. It shall institute a secretarial bureau and appoint a secretary to be known as the Secretary of the League, and " shall institute such other departments and appoint such other officers and assistants as may be necessary to conduct the business of the League and shall fix their salaries."

An important duty of the Council is that of examining " social, economic, and other conditions affecting international relations " and of making annual reports and recommendations thereon. It shall make rules for the functioning of the League just as a department of the Government makes rules under the statute law and under the Constitution. It shall also, by two-thirds majority, both make laws for the States of the League and recommend changes in the constitution of the League, provided that such laws and constitutional changes shall be binding on a State of the League only in case it has not signified its dissent within the period of a year.

It is felt that the world is not ready for a super-State, that the impairment of sovereignty which the League sets up must not extend to the point actually of empowering a central body to make laws for the League without giving each State the right to veto them. When, under the system existing at present, an international convention is agreed upon by the Powers, it becomes operative, as is well known, only against the States which may ratify it. The situation under the proposed League would be analogous though not identical. The laws enacted by the International Council would be operative only as against the States which may have failed to signify their dissent within the period specified.

The International Council has power to declare when conditions have arisen calling for the use of force by the League, each State thereafter determining for itself whether or not it will live up to its obligations under the treaty and proceed either to declare war on the recalcitrant member or, in the case of a minor incident, to furnish its quota to an international force without the formality

of a declaration of war. Some publicists hold that a central organ of the League should have power actually to declare war in the name of the League so as to ensure prompt action. The difficulty encountered in trying to meet this suggestion was the constitutional provision of certain countries that the legislature alone may declare war. It is, however, a serious question whether this power to declare that the conditions have arisen calling for the use of force against a recalcitrant member should remain with the Council, composed of a relatively large number of men and therefore slower to act, or whether it should be lodged in the Ministry. The argument for placing it with the Ministry is that war, once begun in earnest, is hard to stop and that swift and immediate action is required in order to prevent untowards incidents from flaming up into actual war. It is urged further that what is desired is not only swift action but the previous assurance of swift action as well, so that a nation inclined to aggression may not be disposed to take the chances of delay and possible disagreement of the central organ of the League and so be led to proceed with its aggressive plans.

It is argued, on the other hand, that the consent of each State of the League to the proposed war measure will be more readily secured if the question has been considered and passed upon by the International Council, embracing representatives of all the States of the League, that each State will be more reconciled to a decision in which its own representative has participated, and that final action will therefore be equally swift. These arguments should be carefully weighed. The power in question, it must be remembered, is only recommendatory: not the power to declare war, but simply to make a statement of fact—the fact that a State of the League has committed acts of hostility against a fellow signatory. But it involves momentous consequences which touch the basic idea of the League. The lodgment of the function in the proper quarter is therefore of the highest importance.

Another power lodged with the Council is that of calling periodic international conferences "to formulate and codify rules of international law and to recommend to them desirable measures."

It is safe to infer that laws made by the International Council and accepted by the States of the League will in time become law for the world, because the important States of the world will be members of the League and the influence of their example, if nothing

else, will tend to bring about this result. But at the same time it is only fair that in the making of laws, which are to be immediately or ultimately laws for the world, all the world should be allowed to participate. In order to meet this need, the Draft Convention likewise sets up international conferences to which practically all States, whether or not members of the League, are to be admitted and which shall be charged with the duty of codifying and developing international law.

The International Council is also charged with the duty of appointing the Ministry, which is its executive committee.

Council of Conciliation.—The important function of conciliation is to be dealt with by a section of the International Council known as the Council of Conciliation. This section is not appointed by the Council itself: the individual States, in appointing members to the International Council, each designate one member as the member for conciliation. This of course makes a very large Council of Conciliation, but it offers the advantage of enabling the members to group themselves in sections and it is not presumed that they will all act at one time. In fact, it is necessary that the bulk of them should be left free for the general work of the International Council, since the minor Powers each send only one representative to the International Council and all of their representatives are therefore, at the same time, members for conciliation. This may seem a crude arrangement, but it has an object, namely, that the Council of Conciliation itself may be of changing, instead of fixed, personnel.

Now, a Court, passing upon questions of law and equity, ought to be of fixed personnel. Its principal duty is to interpret and apply the law and accepted practices. Permanent composition is desirable in order to ensure proper familiarity with the law and continuity of decisions. Such a Court, if composed of the right men, would only grow in prestige and influence from year to year.

Conciliation, on the other hand, is based on the principle of compromise, which leaves one or both parties to the controversy with a sense that they have not gotten all that was due to them. One can therefore well understand how, when a dispute arises, a nation may object to the presence of an individual who has sat in a previous case in which it or its friends may have failed to secure all that was contended for. A fluctuating personnel on the part of a Council of Conciliation may therefore not be a disadvantage.

The function of the Council of Conciliation is of course to hear and pass upon non-justiciable questions. It may apply, through the Court, for an injunction in connection with proceedings before it. As indicated, it has power to institute sections of its own members, and the recommendation of such a section " shall be the recommendation of the Council of Conciliation unless a litigant dissents," in which latter case the question shall be heard by the full Council. The Council is required to make and file recommendations and opinions.

General Provisions.—The seat of both the International Court and the International Council are to be at the Hague and their members shall enjoy diplomatic privileges. They are forbidden to hold other office or to engage in business or to receive any compensation other than their salaries. Both bodies, their committees and sections, " shall have power to make requisition upon States of the League for information and to call upon them to secure the attendance of witnesses." They can also summon a State of the League to appear and answer a complaint. Their recommendations and decisions must be made within one year from the time the question is submitted, unless the parties, by agreement, extend the time.

The States of the League will share the expenses of the International Council and the International Court in proportion to social income. No costs, recording or other fees may be levied against a litigant either by the Council or the Court. The object of this is to induce all the world to make use of these institutions. It is presumed that the backward nations will not be admitted to the League and will therefore have no representative on the Council of Conciliation. Disputes arising between them or over them are, however, costly to other Powers and not infrequently a source of war between other Powers. It is therefore surely desirable that they should be induced to bring their disputes of a non-justiciable nature before the Council of Conciliation, and the League should be quite willing to incur the expense thereof in the general interest.

In the organisation of the International Court, however, all nations may participate and it might seem unfair to permit them to bring their cases before it without exercising that right and sharing its expenses. But here again expediency would dictate a liberal policy toward non-members, it being presumed that a sense of right

will in time lead nations which use the Court to adhere to the convention and share in the expenses of the institution.

International Conferences.—In addition to the International Council which, it will be remembered, has power to make binding rules for the League and to make law which shall become binding on the States of the League unless rejected by them within the period of a year, it is desirable that there should be an international body to codify and develop international law and to which, therefore, practically all the Powers of the world should be admitted. The acts of this body, like the acts of the International Council, are made subject to veto within the period of one year by the States participating in it.

To convey the impression that this or any other body has a right to make binding law for the world would be harmful, and it is therefore desirable to avoid the use of the term "legislature." The institution has accordingly been given the conservative name of "International Conference." At present it is connected with the League by a very thin thread: it is called and dissolved by the League.

In the beginning it will simply carry on the work of the Hague Conferences and of the Interparliamentary Union. Its usefulness and consequently its powers should, however, increase until, in course of time, it becomes a real and important organ of the League.

A DIGEST OF ENGLISH CIVIL LAW.

[*Contributed by* PROFESSOR H. GOUDY, D.C.L.]

BY the publication of Book V (vol. xi), which deals with the law of intestate succession and administration of assets, the *Digest of English Civil Law*,[1] which was begun in 1903, has been brought to a conclusion and is now before the public in complete form. The composition of the last book is due to Dr. Holdsworth, and it is sufficient to say that it is fully up to the standard of its predecessors and presents a clear conspectus of the leading principles and rules that govern a department of the law by no means simple. The opportunity may be taken, however, to make a few remarks upon the work as a whole.

The Scope of the Work.—The work, as it now appears in five books and eleven volumes, is the product of the joint labour of several members, past and present, of the Oxford School of Law. The division of labour has been as follows: The Editor, Mr. Edward Jenks, formerly Reader in English Law and Law Tutor of Balliol College and now Principal of the Educational Department of the Law Society, is the author of Book I, in which the general principles of the law relating to persons, things and acts in general (such as capacity to act, qualities of acts, etc.) are formulated, and also of Book III, which deals with property and real rights; Mr. R. W. Lee, formerly Fellow and Lecturer of Worcester College and now Dean of the Faculty of Law at McGill University, Canada, has contributed Parts I and II of Book II, embracing the law of contract (both the general doctrines and particular contracts); Mr. J. C. Miles, Fellow and Tutor of Merton College, has dealt with quasi contracts and torts in Book II, Part III; Professor Geldart in Book IV has dealt with family law, and Dr. W. S. Holdsworth, All Souls' Reader in English Law, with succession both testate and intestate. But, as we are told, every rule or proposition stated by its original draughtsman has been examined by the whole of the contributors sitting together and criticising each other's work—a practice only departed from to a small extent for unavoidable causes on one or two occasions. It has naturally ensured great accuracy of workmanship. The work has occupied the authors about a dozen years, which cannot be regarded as unduly long, considering their academical avocations and the magnitude and novelty of the task. A glance over the Tables of Cases and Statutes dealt with in each volume

[1] *Digest of English Civil Law.* Book. V. Succession. Editor, Edward Jenks, B.C.L. (London: Butterworth & Co.; United States: The Boston Book Co., 1916.)

and the several appended Indexes will be sufficient to satisfy any one of the great labour involved.

The Characteristics of a Digest.—The name given to the work—*Digest of English Civil Law*—seems well justified. A digest, though in our English usage it often means a mere collection of rubrics of legal decisions, may be properly applied to any statement of the law or of some specific part of it in a compendious and methodically arranged series of propositions. Text-writers occasionally adopt this form of expounding the topic with which they deal, appending to the several propositions (as is done in the present work) references to authorities and explanatory and critical notes. Dicey's well-known *Conflict of Laws* is an instance of this. The term Digest comes of course from the Roman *Digesta* (or rather from the mediæval form *Digestum*), a term originally used by juristic writers of the Early Empire to indicate works of the nature of an encyclopædia of principles and rules of the civil and prætorian law. Justinian afterwards applied the term to his famous collection of extracts from authoritative writings of jurists of the classical age, more or less interpolated so as to bring the extracts into harmony with the later Byzantine law. Justinian's Digest, however, differed from its predecessors in having had statutory authority conferred on it, while they were purely private compilations. It is therefore more strictly a Code than a Digest, but a codification only of the common law (the *jus*), the statute law (the *leges*) being consolidated by a separate work (the Codex). The work of Mr. Jenks and his colleagues, accordingly, corresponds more to the old classical *Digesta* than to that of Justinian. On the other hand it is, in respect of its method, clearly distinguished from institutional treatises, hand-books, or the like, covering the same or a similar field, *e.g.* Blackstone's *Commentaries* or Stair's *Institutions*.

The Use of the Term "Civil Law."—As its title indicates, the present work is confined to the English *Civil Law*. Civil law is an ambiguous term. Commonly of course it means the Roman law either in its pure state or as developed in mediæval or modern systems. But in a wide sense it may be used to mean the whole law of a country, or municipal law as contrasted with international. Or it may be taken as the antithesis of criminal law; or, in another aspect, of ecclesiastical law; or, in another, of constitutional law. Or, again, it may be used in the sense of the substantive private law relating to purely civil matters, exclusive of procedure or so-called adjective law. It is in this last-mentioned sense that it was used in the *Code Napoléon* (now called *Code Civil*), and it is apparently in this sense that it is used by Mr. Jenks and his coadjutors. They therefore do not deal at all with criminal, ecclesiastical, or constitutional jurisprudence (which may all be classed as public law), and they expressly exclude civil procedure and conveyancing as being merely machinery of the law. In like manner, it may be mentioned, the German *Bürgerliches Gesetzbuch*

applies only to the substantive private law, the topics of criminal law, civil procedure, etc., being dealt with in separate codes. And further, following the French *Code Civil* and the *Bürgerliches Gesetzbuch*, the details of mercantile law are excluded from the work before us.

The Method of Treatment.—In determining the order of treatment of their subject-matter, Mr. Jenks and his colleagues have had to face a difficulty which has always troubled writers of systematic legal treatises. They had to ask themselves—what is the most logical and at the same time most convenient method of arrangement of the topics which they have to expound? No arrangement perhaps can be regarded as perfectly logical nor can cross-references be avoided. All, or nearly all, writers, however, are agreed that in dealing with a system of private law there are certain main heads under which the several topics must be grouped. These are usually described as (1) Personal and Domestic Relations, (2) Property and Real Rights, (3) Succession, (4) Obligations (Contracts and Delicts), and (5) Actions or Civil Procedure. This is the division in effect adopted in the Institutes of Gaius and Justinian, though for certain reasons a tripartite division into the law relating to Persons, Things, and Actions respectively is formally given. Most modern writers have followed it and, in particular (apart from the exclusion of actions as above mentioned), it is the arrangement of the French *Code Civil*. On the other hand, a number of modern writers, and notably the framers of the German Civil Code, while following it in the main, have inverted the order of the groups and made some other deviations. Mr. Jenks and his colleagues are in this latter category. They have, for reasons stated in the preface to Vol. I, followed definitely the German Code. They have accordingly placed at the commencement of the work a general part dealing with persons, things, and legal acts (Part I), and have placed personal and domestic relations or so-called family law (marriage, rights of spouses, guardians, etc.) in juxtaposition to succession towards the end of the work. They have also, like the German Code, placed the law of obligations antecedent to the law of property. These changes on the traditional arrangement are not without some advantages.

What strikes one, in reading the several volumes, is the large number of unsettled points, so-called "open questions," that exist in our law. As things stand, these are left to be settled at some indeterminate times by actions brought by private individuals. Why should the heavy costs of having them determined be laid on the shoulders of private persons?

On the whole, Mr. Jenks and his coadjutors deserve cordial recognition for their valuable work. If, as one may hope, there is to be at some not distant date codification of the law of England or, better, of the laws of the United Kingdom, this work will be found of great service to those entrusted with the task. Meantime it ought to be in the hands of and studied by every English lawyer.

THE PUBLICATIONS OF *LE COMITÉ POUR LA DEFENSE DU DROIT INTERNATIONAL.*

[*Contributed by* HUGH H. L. BELLOT, ESQ., D.C.L.]

ATTENTION may be drawn to the work of a small group of French jurists, especially concerned with the study and teaching of international law, who were embodied under the Presidency of that eminent international lawyer the late M. Louis Renault, under the title of the "Committee for the Defence of International Law."

Les Premières Violations des Droit des Gens par l'Allemagne: Luxembourg et Belgique,[1] by M. Renault, was the first of the lectures published by the Committee, which are designed to meet the attacks on law committed by the enemy, to examine some of the problems of the war, and to apply to them solutions based upon those legal and humanitarian principles recognised by the civilised world. Naturally the first volume was concerned with the invasion of Luxembourg and Belgium. Outrageous and horrible as the violations of the laws and usages of war by Germany have proved, they are but the natural sequence of a cynical disregard for the sanctity of treaties and national good faith. The invasion of Luxembourg, as Professor Renault pointed out, was of a singularly grave character, since Germany by the Treaty of London, 1867, had guaranteed its neutrality and "had solemnly promised to enforce respect for the neutrality which she disregarded without being able to invoke any ground for the nullity or discharge from her engagement."

At first she endeavoured to defend her action. In the Kaiser's proclamation France is stated to have violated the neutrality of Luxembourg. Two days later, von Bethmann Hollweg admitted that Germany had acted "in contradiction of the rules of international law and had disregarded the lawful protests of Luxembourg and Belgium, under the compulsion of military necessity."

With the pleas set up by German apologists for the invasion of Belgium Professor Renault made short work.

The German propaganda which has sought to justify the action of Germany against Luxembourg and more especially against Belgium has met with some success even in belligerent countries. The specious arguments and quibbles of German statesmen and jurists were refuted by

[1] Paris: Léon Tenin, 1917.

Professor Renault by unimpeachable evidence in the clearest possible manner. This refutation, therefore, cannot be repeated too often, and it is satisfactory to find that this volume has already been translated into English.

Immunity of Non-Combatants.—For close on three centuries statesmen, jurists, and publicists have been endeavouring to mitigate the horrors of war. One of their principal objects has been to establish the doctrine that the civilian population, so long as it refrains from active participation in military operations, shall not be subjected to violence either in respect of its person or its property.

Before the present war, this doctrine was thought to be securely established. It had on the whole been observed by all civilised states in modern times. As M. Pillet remarks in his brochure *Les violences Allemandes à l'encontre des Non-Combatants*,[1] the second of the series published by the Committee for the Defence of International Law, it has been reserved for German philosophy to repudiate this doctrine. According to their philosophy, in war the whole people are involved and there is no distinction between combatant and non-combatant, between man or woman, between adult or infant life. The logical result of this philosophy is organised frightfulness. The fear of outrage may compel submission more effectually than military operations. Such was the motive which prompted the sack of Magdeburg. It was equally the motive of the conduct of the German command in Belgium and elsewhere. It is the philosophy of Eastern autocracy and is entirely repugnant to Western ideas. It is based on force as opposed to right, and it is not by force, observes M. Pillet, that we shall obtain the observance of the laws of war. If civilisation is not to perish, the fundamental distinction between combatants and non-combatants must, M. Pillet insists, be recognised and upheld. In disregarding this distinction Germany, concludes M. Pillet, has lost on the field not only the flower of her youth, but also the honour of her flag.

The German Deportations.—The world is more or less familiar with the facts relating to the deportations of the civil population in Northern France and Belgium and with the plea of justification set up by the German Government. In *Les Déportations du Nord de la France et de la Belgique en vue du Travail forcé et le Droit International*,[2] Professor Basdevant describes the leading facts, which cannot be indeed disputed, in relation to the laws and usages of war.

He records how this enslavement of a people was carried out. In the dead of night a knock on the door and the whole family must muster at the front door. A German officer selects the victims destined to forced labour in the fields, the workshops, the munition factories, and the trenches of their enemy. Both sexes from sixteen to fifty-five are carried off. An hour at the most is allowed for them to collect their blankets, clothes

[1] Paris: Léon Tenin, 1917. [2] *Ibid.*

and boots, and cooking utensils. Mothers are separated from their daughters, men and women, boys and girls, women of repute and women of no repute, are herded together in cattle-trucks to be transported to their destination either to some other occupied part of France or Belgium or to Germany. The younger girls are reserved as " orderlies " for German officers !

And what of the plea of justification ? Having first carried off from the factories all machinery, the German Government decreed that all able-bodied persons must be compelled by force to work outside their own district in those cases where on account of play, drunkenness, or laziness they were without work or were idle.

Even if these grotesque charges are true, they would fail to justify the German conduct, such conduct as Professor Basdevant conclusively shows is contrary not only to the customary laws of war and the Hague Conventions, but also to those principles of international law which have long been recognised and observed by civilised nations, to the laws of humanity and to the conscience of mankind.

The Laws of War in Occupied Territory.—In dealing with the wanton destruction committed by Germany during the retreat after the battle of the Somme from the region occupied by her troops, M. Favchille in his brochure [1] effectively disposes of Germany's excuses. It is true that Serbia, Montenegro, Turkey, Italy, and Bulgaria, although they signed the Hague Convention 1907, did not ratify it. But they all ratified the Conventions of 1899 together with all the other belligerents. It is idle therefore for Germany to contend that because by virtue of Art. 2 of Convention IV of 1907 she is not bound by the provisions of that convention, she is also not bound by those of 1899. As M. Favchille insists, if the Convention of 1907 is not applicable, that of 1899 revives when all the belligerents are parties to it.

Moreover, those articles dealing with the extent of the power to be exercised by the enemy in occupied territory are practically identical in the two Conventions. And further they contain nothing new. They merely define in more precise language those principles of the law of nations which have resulted from the usages established between civilised nations, from the laws of humanity and the requirements of public consciences, and which have on the whole been observed in modern times by civilised states.

We are all fairly familiar with the facts of the devastation. It can only be compared with that carried out by William the Norman in the North of England. In the words of a German soldier of the 39th Regiment, *" C'est une éternelle infamie pour l'Allemagne."*

Germany, however, makes no attempt to deny the facts. On the

[1] *L'Evacuation des Territoires occupés par l'Allemagne dans le Nord de la France, Février-Mars* 1917. Par Paul Favchille. (Paris : Léon Tenin, 1917.)

contrary she contends they were dictated by military necessity. M. Favchille has no difficulty in disposing of this plea; military necessity did not, for instance, demand that Prince Eitel Frederick should carry off the art treasures of the Château de Babouef like a common thief. Such infamy must eventually be punished. The French Government has already declared its intention to demand reparation for injuries caused by acts not strictly demanded by military necessity. M. Favchille suggests that every town in Germany exceeding 5,000 inhabitants shall be called upon to pay annually a special tax called the *impôt de dévastation* until the damages with interest are liquidated.

Belgian Crimes against Germany.—Other international jurists outside the Committee for the Defence of International Law have addressed themselves to its defence. Too little attention has been bestowed upon that remarkable production of the German Minister for Foreign Affairs, the White Book dealing with the alleged crimes of the Belgian civil population against the German army of occupation in Belgium. Under the title of *The Belgian People's War, A Violation of International Law*, a distinguished American lawyer, Mr. R. W. Hale, has given a translation of some extracts from the White Book. This pamphlet has enjoyed an immense circulation throughout the United States and it forms the text for a brochure by Professor Valery of Montpellier University entitled *Les Crimes de la Population Belge*.[1]

Nothing did more to antagonise neutral opinion than the Belgian atrocities. Naturally the German Government sought to remove this unfavourable impression. To have justified their conduct upon the ground of military necessity or upon the interests of the German State would have been a logical proceeding in view of these doctrines peculiar to the German nation. But to attempt to excuse the actions upon the ground that they were inevitable by reason of the illegal conduct of the Belgian people is simply fatuous and could only emanate from a mind devoid of all sense of justice or legal principles.

The author of the White Book soundly asserts that the German troops gave proof to the civil population of unexceptional regard and of conduct absolutely exemplary. As an instance of these amiable feelings of affection for the Belgian people he cites the occurrences at Louvain. "It is established," he declares, "that the German troops were not guilty of any questionable conduct and they committed no act contrary to international law." It was the wicked citizens of Louvain who were responsible for the evils which happened "by treading under foot the provisions of international law, and who by their thoughtlessness and criminal acts were the authors of their own misfortunes."

Fortunately the facts of the Louvain tragedy are too well known for such childish pleas to impose on any but the ignorant.

[1] Paris: Fontemoign et Cie., 1916.

But as Professor Valery points out, assuming them to be true, upon well-established principles of criminal jurisprudence the attacked has the right of self-defence. And further if defeated and captured he is entitled to be treated as a prisoner of war.

Instead these unfortunate persons were treated as criminals with a savageness foreign to all ideas of justice. Their trials, when indeed such took place, were, as Professor Valery declares, a parody of judicial proceedings. By their own mouth the German authorities are convicted. We are told in the White Book that hostages were legally executed "since their innocence was not probable!"

Salus populi suprema lex esto.—In a remarkably able monograph[1] M. Ch. de Visscher, Professor of International Law in the University of Ghent, discusses the place of this ancient maxim in the domain of international law in time of war. Within the State lawyers have always been found to defend this doctrine, which, however, has no place in English municipal law. But whatever the views of municipal lawyers may have been as to its operation within the State, it has been reserved, says Professor de Visscher, for the jurists of contemporary Germany to extend its application to the fields of international law, and to attempt to establish it therein as a fundamental principle.

In criticising the German school Professor de Visscher deals successively with the doctrines of lawful defence, reprisals, and necessity. Just as under municipal criminal law limitations to the right of self-preservation are imposed (*e.g.* see the *Mignonette* case[2]), so in the relations of States no necessity can justify every violation by one State of the equal right of another State. The precise function of international law, says Professor de Visscher, is to restrain the liberty of action of each State within the limitations compatible with that of the others. He quotes with approval from Bluntschli: "Aucun State ne peut, contre de droit international, faire appel à sa souveraineté parce le droit international a pour base, non pas le bon plaisir des Etats, mais les droits et les intérêts généraux de l'humanité." And as he goes on to point out, the doctrine is incompatible with the fundamental principle of the juridical equality of sovereign States. It is in fact a travesty of the fundamental principles of law. It represents a significant manifestation of that mentality characterised by Gierke in the following terms: "De plus en plus une tendance se fait jour en Allemagne qui menace dans ses fondements l'ideé même du droit. Celle-ci tend à s'absorber quant à son contenu dans la notion d'utilité et quant à son action dans la notion de force."

[1] *Les Lois de la Guerre et la Théorie de la Nécessité.* (Paris: A. Pedone, 1917.)

[2] *Reg.* v. *Dudley and Stephens,* 14 Q.B.D. 273.

NOTES ON INTERNATIONAL LAW.

The Nationality of Trading Corporations.—"Dr. Schuster (writes a correspondent) has laid the juristic world under a debt of gratitude by his thorough examination, in the second volume of the papers of the Grotius Society, of the position of trading corporations in respect of national character. But is it necessary to attribute to these devices for convenient trading a character of this kind? Is it not, rather, confusing to do so? [1] The nationality which Dr. Schuster discovers for corporations has 'an entirely different connotation than when applied to a national person.' The recognition of its 'nationality' (with its valuable connotation) does not entitle it to the trading privileges of its co-nationals. It is difficult to imagine a conception which would be more misleading, or more likely to lead to conflicts.

"The true rule must always be that the national human persons for whose benefit the artificial person exists must be sought out, and the question resolved in the light of their individual nationality. As for domicile, the decision will depend on which of the multifarious uses of the principle of domicile is in question. If by domicile is meant (as Lord Lindley seems to have meant in the *Driefontein Case*) [2] the very different thing called properly 'house of trade,' then the question presents no difficulty. If we mean settled residence as a test of capacity for private law purposes, then we may arrive at one solution, whilst if we mean settled residence as a test of personal identification with the enemy's resources by contributing to his taxes and the support which a resident consumer gives, we may probably arrive at another. Settled and permanent residence provides a single criticism for both points, in the case of an individual. It does not do so in the case of a company: and in fact the independent criterion known as 'house of trade' is in this case

[1] Cf. Landry, "La Nationalité des Sociétés," *Rev. Pol. et Parl.*, Nov. 10, 1916, p. 182.

[2] [1900] 2 Q.B. 343.

all-sufficient as a test of enemy character. As a test of taxability, or of acceptance of a system of private law, nothing corresponding to domicile is needed in the case of a company. It does not consume its profits—it is the creature, and not the object, of laws.

"It is much to be wished that those who cite *Wells* v. *Williams*[1] would remember that the circumstances of the case show that commorant enemies were, at the time it was decided, in the enjoyment of express favour and protection, conferred by Royal proclamation."

The Destruction of Neutral Merchantmen.—Sir Walter G. F. Phillimore recognises, in a paper read before the Grotius Society, that "it is so dangerous to leave any opportunity for quibbles," that the rule of immunity for neutrals should be hampered by no qualifications whatever. Taking this as his text a correspondent writes: "It seemed to not a few hasty observers a fit and proper thing to make the destruction of a neutral vessel a lawful measure, to be justified by the necessities of the case and perhaps made the occasion of compensation. We now see how unpractical is such an idea. It is not giving neutrals the safe sea they are entitled to, to make them subject to the violence and *ex post facto* justice of the belligerent. It was never very consistent with the success of the operations of cruisers to spare prize crews, yet they never indiscriminately sank neutral merchantmen suspected of contraband trade: indeed, they never at one time did it at all, so far as can be seen. Sir Walter is, indeed, in favour of establishing a conventional rule, that a neutral passenger must be safe even on an enemy's ship, and that the same protection must be extended to neutral cargo. This perhaps may be thought to obscure the great line of demarcation which ought properly to exist between the neutral and the enemy flags. The neutral who puts his goods or his person on board a belligerent ship may be said to identify himself with the enemy flag, so that he ought properly to take the chances of violence enacted against it. Otherwise the enemy's operations against the other belligerent's mercantile marine will be greatly hampered. David Webster declared[2] that 'if a ship of war, in thick weather, or in the darkness of the night, fire upon and sink a neutral vessel, this is a mere wrong, and cannot be said to be done by any right accompanied by responsibility for damages. The Government of the U.S. has frequently made known its opinion,

[1] (1698) 1 Salkeld 45. [2] 32 British State Papers 470.

which it now repeats, that the practice of detaining American vessels, subject to just compensation, however guarded by instructions, or however cautiously exercised, necessarily leads to inconvenience and injury. The amount of loss cannot always be well ascertained. Compensation, if it be adequate in amount, may still necessarily be long delayed, and the pendency of such claims always proves troublesome to the governments of both countries. These detentions, too, frequently irritate individuals—cause warm blood, and produce nothing but ill effects on the amicable relations existing between the countries. We wish . . . to put an end to them, and to avoid all occasion for their recurrence.' The violation of a ship under the national flag has, at any rate often and by high authorities, been regarded as no less heinous than the violation of national territory. Ortolan, in an eloquent passage, treats the national honour as involved in that principle. It formed the ground of the excitement produced by the *Trent* affair. Lord Clarendon and Lord Lyndhurst describe merchant-ships as detached portions of territory.

"But this very strength of national character which preserves, or ought to preserve, the neutral ship from sudden violence, tends to invest with a belligerent character all the persons and things on board a belligerent one. What is certain is, that a belligerent cannot, like the Germans, have it both ways. They cannot sink neutrals because ships have no specially sacred national character, and at the same time drown neutrals on board belligerent ships because they have. That would be to imitate and to go beyond the discarded idea that '*la robe ennemi confisque le vaisseau d'ami.*'"

Hugo Grotius.—It is useful to have at hand in these times the account of Hugo Grotius which, appropriately enough, an American lawyer of Dutch descent, Dr. Hamilton Vreeland, has given us.[1] Professor Goudy in his introduction to the second volume of the *Proceedings of the Grotius Society* drew attention to the fact that no attempt had yet been made "to estimate the character of Grotius's writings nor the Grotian system as a whole." This gap in our modern critical estimates of great jurists and their systems has in some measure been filled by Dr. Vreeland, who in the course of research work at the University of Leiden has been able to verify

[1] *Hugo Grotius: the Father of International Law.* By Hamilton Vreeland, Jr., LL.B., Ph.D., of the New York Bar. (New York: Oxford University Press.)

many of the references which appear in the biography of Grotius begun by Caspar Brandt, the Dutch historian (who carried the record to the year 1632, the year of the battle of Lützen where Gustavus Adolphus, the great admirer of the *De Jure Belli ac Pacis*, fell), and completed by Cattenburgh in 1727. Dr. Vreeland tells us that he has " seen letters from Pieter and Hugo de Groot, son and grandson of Grotius, to Brandt, offering documents and letters in their possession to the historian for use in his work." There have been rumours that new documents relating to Grotius are now available in Holland, but Dr. Vreeland does not mention the fact.

Grotius was born on April 10, 1583; from the age of eight years his fame as a scholar had begun to spread, and when he died on August 29, 1645, he was among the very famous men of his age, famous as a scholar, a diplomat, a lawyer, a poet, a man whose extraordinary intellectual power dominated the courts, the chanceries, the universities, the thinkers—from Milton to Casaubon and Salmasius, from Selden to Gustavus Adolphus—of Europe. It seems, therefore, rather improbable that any lost letters or literary remains will appear at this late date. Yet on the other hand we have to remember that his treatise *De Jure Prædæ*, written in 1604–5, was only found in 1864. But from the first his manuscripts were taken in charge. Thus his rendering of the Planudean Anthology, begun in 1630 and left unfinished, though partly in the hands of the printer, was deposited, Dr. Sandys tells us in his admirable account of Grotius's scholarship, in the library of the Jesuits' College in Paris in 1665, twenty years after the author's death. " It was published by Jerome de Bosch at Utrecht in 1795–8, with the aid of a transcript from England corrected by Grotius himself," and has since been reproduced as part of the Didot Edition of the Greek Anthology. Professor Goudy confirms Dr. Sandys' high estimate of the scholarship of Grotius. His contemporaries bear witness to his gifts as a statesman, diplomatist, and a man of the deepest religious convictions. All thinkers since the year 1625 have combined to testify to the profound idealism combined with practical application that are the notes of his great work on the laws of peace and war. The author of this book is the latest of many thinkers and men of action who have laid their tribute at the feet of this great man. Dr. Vreeland writes: " It was Hugo Grotius who above all others held up to nations the court of arbitration, administering one law

for all, as their common and ultimate destiny. Looking beyond the struggles born of avarice, jealousy, and misunderstanding, by which his own time was obscured, he rescued from the prevailing darkness this high ideal, and, with the faith and vision of a prophet, set it before a stricken world, painfully toiling towards the day when might shall be subordinated to right, and justice shall reign unhindered."

The "Mare Liberum."—Dr. Vreeland's book is supplemented by the fine and very learned edition of the *Mare Liberum* now issued with an English translation by Professor Magoffin of the Johns Hopkins University.[1] The edition is given us by the Carnegie Endowment for International Peace, and indeed it is a very timely production. The dissertation is a chapter of the treatise *De Jure Prædæ* which there is some evidence to show was produced by Grotius for the purpose of advising, in the course of his legal practice, the Dutch East India Company. Written in 1604 it was attacked by Selden in his *Mare Clausum* in 1617. William Welwod, the Professor of Civil Law in the University of Aberdeen, had already attacked, in 1613, the *Mare Liberum*, and Grotius prepared a reply which was also discovered with the *De Jure Prædæ* in 1864, and published in 1872 by Muller in his *Mare Clausum*.

Scholars as well as students of the history of international law will find much instructive matter in the edition of Grotius' famous plea for open seas. The footnotes to the innumerable classical and legal references in the work as originally published '' are in a most abbreviated form, and the references are seldom specific. They have been expanded without further explanation.'[1] Professor Magoffin dismisses in these few words a veritable mine of research work. The footnotes as they stand are a tribute to the scholarship and the knowledge of mediæval law of Professor Magoffin and those, such as Mr. J. C. Martin and Bishop Shahan, who have helped the learned editor. The minds of Grotius and Selden were much alike. Any admirer of Selden can imagine what the labour of editing his works must be, a labour that a certain public is anxious to see completed; but they can gain an almost

[1] *The Freedom of the Seas, or The Right which belongs to the Dutch to take part in the East Indian Trade*: a dissertation by Hugo Grotius. (New York: Oxford University Press.)

exact picture of that labour by examining the footnotes to this edition of the *Mare Liberum*, which is, as Professor Magoffin says, "still an open book." We are not prepared, however, to admit, in view of the events of the war of 1914, that the *Mare Clausum* has ceased either to instruct or to entertain. Professor Magoffin quotes Lord Stowell's statement of the law: "all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation." That is certainly the law; but it is the law in a sense that both Selden and Grotius would have admitted It leaves open the question whether in war-time the ocean is susceptible of appropriation in a temporary fashion for the legitimate purposes of war. To-day appropriation by exclusion is a physical possibility, and is in fact claimed as a War-Right by Great Britain and the United States of America. That it is not a Peace-Right Grotius made clear.

Sweden and Cables.—On the difficulties that arose between Sweden, Argentina, Mexico, and the Allies through the facilities afforded by Swedish diplomatic agents to Germany to use cables in code for direct belligerent purposes, a correspondent writes that they were dealt with in anticipation by the late Professor Westlake in the 1913 edition of his *International Law*.[1] He wrote: "There is no doubt that a State is bound in principle not knowingly to allow the use of its services for the reception and transmission of letters or telegrams, the latter whether wireless or not, in furtherance of belligerent interests; and when any such service is not a State monopoly, its exercise in the territory by a private undertaking ought to be subject to a similar restraint. Such use of the service would be a direct aid to the belligerent, an implication in the operations which were combined by means of it, and would make the territory a base of operation to that extent." Dr. Westlake goes on to point out the difficulties as to cipher and says that all a State can do is to refuse messages in cipher. The facts in the present case made it clear that Sweden was responsible for the use of foreign territory as a base of operations. *Facit per alium facit per se.* In accordance with diplomatic usage all diplomatic agents possess uncontrolled power to use cables. When war breaks out this power is duly limited in the case of the agents of belligerent Powers. For the agent of a

[1] Part II. *War*, p. 253.

neutral Power to cancel this limitation is an unfriendly act against any belligerent adversely affected as well as against the neutral Power to whom the agent is accredited. It was therefore clearly the duty of Sweden as a neutral to purge itself of this offence against the law of neutrality.

The same principle applies in the very numerous cases that have happened during this war of the use of neutral territory by belligerent airships and aeroplanes. These trespasses are not only infringements of neutrality that the neutral is entitled to deal with in summary fashion. They also, as in the case of the surreptitious use of neutral cables by a belligerent, involve the use of neutral territory as a base for belligerent operations. For a neutral to acquiesce in the user of its air-space for such a purpose is an unneutral act which undoubtedly gives rise to a claim for such damages as are consequent on such user; and such user might amount, unless extraordinary efforts are made to suppress it, to a *casus belli*, and the injured belligerent may enter the neutral State and take such measures as are necessary to prevent the violation of the neutral air-space from operating to his disadvantage. This is the rule as to the land [1]; and there can be no doubt that the same rule applies to air-space, since the higher the air vessel flies the greater the danger to the neutral territory. It is submitted that if the neutral pleads that the height at which his air-space is used precludes the possibility of restraint, the injured belligerent may enter and suppress the violation by his own efforts.

Enforced Labour in War.—The use of civilians by Germany in Belgium or elsewhere for (*a*) enforced labour in civil work related to the war, (*b*) for work directly related to the war as in the making of forts or docks or sheds for Zeppelins, is a deliberate reversion to the methods of barbarism employed by Germany in the Thirty Years' War. In the Franco-Prussian War the King of Prussia issued a proclamation stating: 'I make war against French soldiers, not against French citizens. The latter therefore will continue to enjoy security for their persons and property so long as they themselves shall not, by hostile attempts against the German troops, deprive me of the right of affording them my protection." In the earlier stages of the present war many thousands of Belgians were removed to Germany and put to

[1] Wheaton [Phillipson], 5th ed. p. 641.

forced labour under conditions involving the greatest cruelty to men and barbarity to young women. There has been in the past month a terrible recrudescence of these crimes against the first principles of humanity, and the employment of civilians on the Belgian coast-line under the direct fire of the British aeroplanes is an offence against the law of nations that will have to be expiated to the full.

The Bosphorus and the Dardanelles.—The Straits which divide Europe from Asia are one of the most historical sea-passages of the world, and are of paramount importance to both groups of the present belligerents; indeed the authors of *The Question of the Bosphorus and the Dardanelles*[1] go so far as to say that the determination of the problem of the Straits was one of the reasons for Russia's entering upon the present conflict. The legal character of the Straits is necessarily closely connected with that of the Black Sea, to which they are the door. The authors trace the evolution of the Rule of the Straits (viz. that no foreign ships of war are to pass them) from the time of the occupation of Constantinople by the Turks in 1453 down to the present day, which still finds that principle in force. As the Black Sea was successively a Turkish lake and a Russian lake, according to the territorial acquisition of its shores, and finally became an international sea, so the considerations, political and commercial, governing the access to and from it have varied, and at the present day there can hardly be a doubt but that the international importance of the channel which connects the central seas of Europe together requires its complete freedom from all restrictions and its regulation by some kind of international administration. One fact seems clearly to emerge from the summarised account of all the various policies and treaties which the various Powers interested have entered upon with the Ottoman Empire—or with regard to it—from the time that it was seen to be unable to stand alone, namely the constant and inevitable effort of the State possessing the chief commercial and political importance in the Black Sea to secure an unrestricted outlet to the ocean for its trade, and that it would have been better policy for ourselves and the other Powers to have facilitated this national tendency instead of opposing it.

[1] *The Question of the Bosphorus and the Dardanelles.* By Coleman Phillipson and Noel Buxton. (London: Stevens & Haynes, 1917.)

The international character of the Straits dates from the Convention of 1841, to which Austria, Prussia, Russia, Great Britain—and afterwards France—were parties, which declared the ancient rule of the Ottoman Empire to be that ships of war of foreign Powers were prohibited from entering the Straits, the Sultan declaring his firm resolution to maintain this principle and so long as he should be at peace not to admit foreign ships of war into them, and the other Powers engaging to respect this determination and to conform to this principle, the only exception being in the case of light ships of war, to which the Sultan reserved to himself the right to deliver passes, and which were employed according to custom for the service of correspondence of friendly Powers.

The phrase, "ancient rule of the Empire," apparently is found for the first time in the Treaty of the Dardanelles between Great Britain and Turkey in 1809. The Treaty of Paris (1856) by an annexed convention contained provisions to the same effect, with the addition of the right of passage for light ships of war to be stationed off the mouth of the Danube for carrying out the regulations relating to the liberty of that river, which each signatory Power could send, not exceeding two in number. This treaty also neutralised the Black Sea and interdicted it to the flag of war, limiting both Russia and Turkey to a certain number and force of light war vessels, and those Powers undertaking not to establish or maintain on its coasts any military or maritime arsenals. This treaty was, however, modified by the Treaty of London in 1871, which abrogated the last-mentioned prohibitions against armaments in the Black Sea, but renewed the principle of closing the Straits as stated in the convention annexed to the Treaty of Paris, with, however, the important addition that the Sultan should have power to open the Straits in time of peace to vessels of war of friendly and allied Powers in case he should judge it necessary in order to secure the execution of the stipulations of the Treaty of Paris.

The Treaty of London being confirmed by the Treaty of Berlin in 1878 still governs the position, and according to the generally accepted opinion it represents a collective engagement by all the signatories *inter se*, and not separate engagements with Turkey by the other Powers, so that it would seem that the consent of all the other signatories is required to a grant of passage to one signatory by Turkey, and that this is not a matter solely between such Power and Turkey.

The former interpretation has been upheld by Great Britain on several recent occasions against Russia, who maintained the latter, though curiously enough at the Berlin Conference Russia had formally set up the former view, in answer to a declaration by the British representative (Lord Salisbury) that Great Britain would only be bound to abstain from passing the Straits in any case in which Turkey should be acting independently and not under pressure from some other Power. The meaning of the rule is therefore not definitely ascertained nor the existing *régime* satisfactory.

The authors of this volume after examining the attitude of Russia at various times during the last century and the views recently expressed by Russian and other publicists and writers as to the status of the Straits and of Constantinople, conclude that the proper principle is that of opening the Straits instead of closing them, and placing them under an internationalised *régime* similar to that of the Suez and Panama Canals, and making Constantinople a free town, which with the Straits and sufficient adjacent territory should be administered by an International Commission like the Danube Commission. This solution is favoured by the fact that new States like Roumania and Bulgaria are entitled to have their interests in the Black Sea considered, and the present disintegrating tendency in Russia deprives her of the preponderance in the decision of Black Sea commerce questions.

Transport of Prisioners of War.—A White Paper recently issued[1] contains the Report of the Government Committee on the transport of British prisoners of war from the field to the camps, based upon the statements of forty-eight British officers and seventy-seven N.C.O.'s and men captured between the outbreak of the war and the end of 1914. The treatment of these unfortunate men, many of them wounded, was much the same as that endured by the prisoners in the Wittenberg and Gardelegen camps. Black as is the record of Germany in the latter case, the excuse of fear of contagion might be pleaded by those who abandoned their posts. It might be argued that it was rather a case of nonfeasance than of misfeasance. In this question of transport, however, the Committee declare that the evidence proves a system of organised cruelty. When all possible allowance is made for the difficulties of the situation, the most and

[1] Parl. Paper, Misc. No. 3 (1918). (Cd. 8984.)

the worst of the sufferings of these men remain unexplained. The absence of hospital trains in the early months of the war may have been inevitable, but there was surely no excuse for herding the wounded in cattle trucks inches deep in manure and without any medical attention whatever. Even when British officers of the R.A.M.C. were on the train they were not allowed to attend their own wounded. During one journey from Cambrai which occupied five days two medical officers were only allowed to leave their compartment *twice* to attend to some particularly bad case. Moreover, in only a few cases were they allowed to retain their medical stores, and even these were as a rule broken open and rifled.

"Besides the miseries of filth, of suffocation, of overcrowding, of untended and putrescent wounds, the prisoners endured prolonged and quite needless torment through hunger and thirst." Whenever the trains stopped—and they seem to have stopped wherever a crowd could be collected—the prisoners were subjected to insult and abuse. They were knocked about and spat upon by soldiers and civilians alike, well-dressed women spitting into an officer's face or into a glass of water before offering it. In some cases they narrowly escaped being lynched by the crowd, the ringleaders being frequently German officers. Amongst the women those attached to the German Red Cross appear to have been the worst offenders.

In this black record there is one ray of light. The German guard often did what they could for those in their charge provided they were sure of doing so unobserved by their officers or by the crowd. Sometimes they gave them a little of their food and water. Towards the end of 1914 we are told that one officer is known to have travelled in a hospital train, but it was not till the later months of 1915 that it became a general rule for wounded British prisoners to receive medical care on the journey to Germany.

It is to be hoped that the evidence here collected will be brought to the notice of neutral peoples. So far we have only had unauthorised stories in the press. Here we have the evidence taken and tested by official examiners. It bears on its face the impress of truth. It is too obviously frank and circumstantial, and one witness so closely corroborates another, that it cannot be discredited.

Internment of Seaplanes.[1]—A dispute has arisen between Great Britain and Holland upon the question whether seaplanes and other

[1] Parl. Paper, Misc. No. 4 (1918). (Cd. 8985.)

war material salved on the high seas by the Dutch merchant service and brought within the Netherlands jurisdiction should be interned or restored. The British Government demands restoration, whilst the Dutch authorities maintain that it is its duty to retain until the conclusion of the war. These objects were certain naval gear recovered from the British cruisers *Cressy*, *Hogue*, and *Aboukir*, sunk in 1914; a seaplane forced to descend in the North Sea in the same year and towed by the Norwegian steamer *Orn* to the Hook of Holland; stores from the British destroyer *Medusa* towed by Dutch fishermen to Terschelling; a seaplane forced to descend in the North Sea in April 1916 and taken to a Dutch port by a Dutch trawler; a seaplane abandoned near the Noord-Hinder lightship from which a Lewis machine gun was taken by some men from the lightship, the seaplane being ultimately recovered by the British naval authorities; and a seaplane forced to descend in the North Sea in September 1917. In all cases the officers and men rescued were released and sent home and all personal effects were handed over to the British Consular representative.

The British Government contended that there is no general rule compelling a neutral to intern every member of belligerent forces who enters its territory or every warship which comes into its harbours. The case of the seaplanes was analogous to that of shipwrecked members of belligerent forces rescued by neutral merchantmen. Whilst on board the latter they may be retaken by an enemy warship. But once on neutral territory, since they came there by accident and not to avoid capture, they need not be interned.

The Dutch Government replied that although there was no explicit rule on the subject, a dominant principle did exist. By the law of nations a neutral State must abstain from all actions which amount to strengthening the armed forces of belligerents. The release of shipwrecked men rescued by merchant vessels was an exception and motived by the humanitarian desire to protect personal liberty as far as possible. This consideration did not arise in the case of war material salved from the sea. To restore such material would be incompatible with the duties of neutrality laid down in Art. 6 of the 13th Hague Convention, 1907, prohibiting the supply directly or indirectly by a neutral to a belligerent of warships, ammunition, or war material.

In his rejoinder Mr. Balfour pointed out that with the exception of the seaplane rescued by the *Orn* possession of the property salved

was taken unasked. In the case of the Lewis gun, it was difficult to perceive much difference between such conduct and the misappropriation of goods which becomes the subject of criminal proceedings.

There was no express rule prohibiting the internment of shipwrecked crews rescued by merchantmen. The rule was merely mentioned in the report of the Drafting Committee on the Hague Convention. It was not an exception but a rule recognised as flowing naturally from the general principles which govern the question of the internment of belligerent persons and war material by neutral Powers. The reference to Art. 6 of the 13th Convention was irrelevant. It only applies to the supply of war material owned by the neutral and has no wider scope. Further, the property would never have come into the possession of the Netherlands Government at all if its subjects had left it alone. "There could have been no question of the Government furnishing any of the articles to H.M. Government had they simply refrained from impounding goods which no rule of international law required them to seize." Here for the moment the matter rests.

War Crimes.—A correspondent writes as follows as to "war crimes":

"In this connection the *Rules of Land Warfare*, 1914, published by the Chief of the Staff of the United States Army, is of special interest, though it is perhaps even more interesting to learn that since the entry of the United States into the war it has been withdrawn. It is based, as might be expected, on the famous *Instructions* of 1863, but it embodies also much of the rules of land warfare contained in our own *Manual of Military Law* and in the French rules published by Jacomet. The point to which attention may be called is the immunity of the soldier from punishment in the commission of war crimes if they are committed under the orders of his superior officer or of his Government. Art. 368 of the *Rules of Land Warfare*, 1914, deals with the punishment of offences against the laws of war committed by members of the armed forces. It says:

"'Individuals of the armed forces will not be punished for those offences in case they are committed under the *orders* or *sanction* of their Government or commanders. The commanders ordering the commission of such acts or under whose authority they are committed by their troops may be punished by the belligerent into

whose hands they may fall.' This goes far beyond the scope of Art. 443 of chap. xiv. of the British Manual, viz. 'Members of the armed forces who commit such violations of the recognised rules of warfare as are ordered by their Government or by their commander are not war ~~prisoners~~ and cannot be punished by the enemy. He may punish the officials or commanders responsible for such order if they fall into his hands, but otherwise he may only resort to the other means of redress,' *i.e.* reprisals.

"Thus it will be seen the American rule renders immune not only those who have committed offences under orders, but also those guilty of offences *sanctioned* by their superior officers. The British rule may be regarded as contrary to the principle of Anglo-American jurisprudence that the individual is personally responsible for his acts whether committed under orders or not. It is submitted that a soldier who under orders commits an act which is forbidden by international law cannot plead in an enemy Court the order of his Government or of his commander as a defence. To argue that a man cannot be punished for committing a crime against the subjects of another State because by the law of his own State he is legally bound to commit the act is to confuse the issue. To offer as an alternative to a legal sanction the primitive weapon of reprisals is the offer not of a jurist but of a militarist.

"The addition contained in the suggested rule is even more indefensible. Here there is no question of the soldier being ordered to do the act. Suppose a commander stands by and allows his men to pillage a town without expressly ordering the acts. Is the soldier to be allowed to plead that because he was not forbidden to loot, he is not to be punished for a violation of the laws of war? And yet under the American rule such an act in such circumstances would appear to fall within the phrase 'sanction of his commander.'

"Was it not Halleck, jurist and general, and Minister of War during the American Civil War, who wrote: 'For anything done in violation of the laws of war, the individual is liable'?"

Hall's "International Law."—Dr. Pearce Higgins has spared no pains to make the seventh edition of the late Mr. W. E. Hall's classical work on international law[1] worthy of the author and of a

[1] *A Treatise on International Law.* By William Edward Hall. Seventh edition, edited by A. Pearce Higgins, M.A., LL.D. (Oxford: at the Clarendon Press. 24*s.* net.)

supreme occasion: the present struggle for a sanction to the law of nations. Mr. Hall, in the third edition of his work, writing on August 1, 1889, exactly a quarter of a century before the outbreak of these present wars, foresaw the struggle that was coming. He realised that there was a movement towards a firmer basis for the law of nations: "Progressively it has taken a firmer hold . . . it has more and more dared to grapple in detail with the fundamental facts in the relations of States." But on the other hand, he writes:

> It would be idle also to pretend that Europe is not now in great likelihood moving towards a time at which the strength of international law will be too hardly tried. Probably in the next great war the questions which have accumulated during the last half-century and more, will all be given their answer, at once. Some states, moreover, will crave for satisfaction; much envy and greed will be at work; but above all, and at the bottom of all, there will be the hard sense of necessity. Whole nations will be in the field; the commerce of the world may be on the sea to win or lose; national existences will be at stake; men will be tempted to do anything which will shorten hostilities and tend to a decisive issue. Conduct in the next great war will certainly be hard; it is very doubtful if it will be scrupulous, whether on the part of belligerents or neutrals; and most likely the next war will be great. But there can be very little doubt that if the next war is unscrupulously waged, it also will be followed by a reaction towards increased stringency of law.

It is a remarkable prophecy, though Mr. Hall on the whole would, we may believe, have admitted that Germany has behaved far worse than even he would have anticipated and the enemies of Germany far better than he feared. It may truly be said that Belgium and her great allies have striven to keep the law with might and main and have, on the whole, only adopted inevitable developments of the law of neutrality and in the practices of contraband and blockade. The conduct of the Entente allies in the field, in the air, and on the sea has by universal consent been humane to a degree rarely known in war. From the first they have stood for the principles of international law and they are pledged to re-establish them. Dr. Pearce Higgins emphasises this. He regards President Wilson's declaration of April 2, 1917, as marking "one of the great turning-points in the world's history." Indeed we may say that all the Entente allies went to war "for the universal dominion of right

by such a concert of free peoples as will bring peace and safety to all nations and make the world itself at last free."

. . . . .

Dr. Pearce Higgins has greatly added to the value of the work by incorporating in the chapters dealing with prize law and naval warfare the important decisions of British Prize Courts and also by illustrating ancient and difficult questions relating to enemy characters by the decisions of the British Courts of law. This war has shown certain developments in various questions involving capture and notably in relation to the doctrine of continuous voyage. *The Kim*[1] illustrates this development along the lines of common sense. The presumption of hostile destination which arises in circumstances of suspicion must be repelled by the shippers or other claimants. That is the view of both the French and English Prize Courts and is a view too reasonable to be disputed. The extension of the doctrine of blockade to neutral ports is perhaps more difficult in theory, and no doubt the application by the Maritime Rights Order in Council, 1916, of the principle of continuous voyage to blockade has been and will be attacked. But in fact blockade ceases to be a weapon of war if it can be evaded by an open neutral port in direct connection with an enemy base. If blockade is admissible at all it must be capable of extension to neutral ports that are in fact enemy ports for the purposes of a shipper. In other words, international law, if it is true law, must be capable of growth to meet the eventualities which it was intended to meet. Power of growth to meet new needs is the test of a living law. This power is not the same thing as arbitrary extensions of rules to meet particular cases on the ground of "war necessity." Dr. Pearce Higgins states the facts as to the practice of England and France in this war, and points out that "modern American writers uphold the view that continuous voyage applies to blockade." Mr. Hall clearly did not hold this view: but it may be doubted if his common sense would have condemned this development of the law in the circumstances of the present time. If there is to be blockade at all it must be sufficiently effective to prevent neutrals so communicating with one another as to supply a belligerent with everything that he needs.

. . . . .

[1] 1 B. & C. P.C. 405.

Dr. Pearce Higgins also deals more fully with international waterways, air-sovereignty, and wireless telegraphy. On the subject of the air he writes: "So long as air-craft remain so largely military instruments, the principle of unlimited exclusion based either on the principle of air-sovereignty or State-safety will, it may be predicted, be asserted." This is perhaps too cautious an attitude. The State under Roman law certainly claimed air-sovereignty and it is difficult to see how in any circumstances any sovereign State could resign the right of complete control over the air-space above the land or the territorial waters of the State. No doubt adequate facilities for transit will be afforded by agreement, but in view of the fact that danger to the land below actually increases with the height reached by air-craft it is certain that in peace as in war the State must possess the right to regulate transit. But the editor here as elsewhere is very cautious, and that can hardly be criticised as a fault; though sometimes opinions based on facts—in this book set out with characteristic and meticulous care—help to mould practice on right lines. That was indeed Mr. Hall's own gift.

The Channel Tunnel.—Some interesting and difficult questions of international law are raised by the proposed construction of a tunnel connecting the railway systems of Great Britain and France. They have recently been discussed in a monograph[1] by Dr. C. J. Colombos. Although the name of the English Channel has been given to the waters of La Manche by the English, such a title of ownership as this name implies finds no recognition in international law. And even if Great Britain still retained possession of both sides of the Channel, a *mare clausum* blocking transit between the North Sea and the Atlantic Ocean would not be tolerated. The English Channel therefore in spite of its name is a *mare liberum*. Are the high seas, as some jurists even now assert, *res nullius*? Professor Oppenheim would appear to hold that they are: the construction of the tunnel, he says, does not offend any principle of international law; the consent of the Powers other than Great Britain and France is unnecessary.[2] If the doctrine of *res nullius* coupled with the doctrine of full national sovereignty over territorial waters by

[1] *Le Tunnel sous la Manche et le Droit International.* (Paris: Rousseau et Cie. 1917.)

[2] *Der Tunnel unter dem Ärmelkanal und das Völkerrecht*, ii. (1908), pp. 3–4.

the littoral States be accepted, two distinct juridical systems of control would be created.

Both these doctrines are rejected by Dr. Colombos. In his view the sea is *res communis*. The sea is incapable of appropriation in any part. There is no essential difference between the high seas and territorial waters.

" Cette conception de la mer," he writes, " chose commune, conduit à des conséquences toutes différentes de celles aux quelles conduisait la conception de la mer *res nullius*. Avec cette nouvelle conception, en effet, on est amené non plus à dire que la haute mer est sous traite à toute réglementation de la part d'un Etat, mais à dire que la haute mer peut-être réglémentée dans l'interêt de tous les Etats par l'ensemble des Etats. Non seulement chaque Etat peut exercer en haute mer une jurisdiction sur ses nationaux et leurs navires, mais encore la communauté internationale peut edicter des règles obligatoires pour les puissances et leurs nationaux dans le but de faire rendre à la haute mer le maximum des effets utiles pour l'ensemble des Etats."

If this conception be adopted, is the " sous-sol " also *res communis* ? Some would say that it is, subject to the State exercising sovereignty over the surface, but in that case no State could exercise sovereignty over the tunnel; others that it forms " an accession " to the territory of the State constructing it, but this would not satisfy the rules of accession. It is, however, declares Dr. Colombos, " une bien vacant et sans maître," i.e. *res nullius*, and so capable of ownership by occupation. On this point he agrees with Professor Oppenheim.[1]

Just as the ownership of the soil and the subsoil on the mainland may be divided, so with the bed of the sea and the subsoil. The former, it may be argued, is incapable of occupation since it is *res communis*, but the latter is *res nullius*. Consequently the " sous-sol " of the English Channel may be occupied by English and French companies under the authority of their respective governments and the tunnel would pass under the sovereignty of Great Britain and France.

Status of Russian Consuls.—" Consuls are not, strictly speaking, international agents of their respective Governments," writes an authority on international Law. They are officials

[1] *International Law*, vol. i. § 287.

appointed by their State to reside in foreign countries, 'partly for the purpose of watching over the interests of the subjects of the State by which they are appointed and partly of doing certain acts on its behalf which are important to it or its subjects, but to which the foreign country is indifferent, it being either unaffected by them or affected only in a remote and indirect manner.'[1] In the performance of the manifold duties imposed by these objects, the actions of a consul are not of an international nature. Formal representations to the foreign government cannot as a rule be made by consuls. Such representations should be made through the resident diplomatic agent. By some consular conventions[2] it is true the right of making representations to local authorities and even to the government itself, where the diplomatic representative is absent, is given. A consul-general or consul is in all cases appointed by a commission or patent, which on communication to the foreign government is recognised by the issue of an *exequatur*. In Russia, however, the consul merely received notice of his recognition. An *exequatur* or recognition may be refused if the person appointed is personally objectionable. For instance, in 1869 an *exequatur* was refused by Great Britain to a person known to have been connected with Fenian plots. So too the *exequatur* may be revoked if the consul transgresses his functions. Any interference in political affairs is regarded as a most serious breach of his duties. Although a consul is not internationally a representative of his State, he does possess a public official character, so that, as Hall says, he may be said to have a sort of scintilla of an international character. For this reason an outrage upon him in his official capacity is regarded as a violation of international law from which the government of the State in which he resides is bound to protect him. What then is the status of a consul when the government by which he was appointed has ceased to exist? Is his status analogous to that of a diplomatic agent, whose office terminates with the decease of his sovereign or with a change of his government by revolution? It would appear to be so. It is true that since a consul is not a diplomatic agent, his official position is not affected by a political

[1] Atlay's edition of Hall, p. 326. As to rights and privileges of Russian consular officers in particular, see chap. vii. of Baron Heyking's *Practical Guide for Russian Consular Officers*.

[2] On the subject of consular conventions generally and the desirability of their extension, see Baron Heyking's article, Journal, vol. xiii. pp. 574 *et seq.*

change in the State in which he is residing. But when the government by which he was appointed has ceased to exist, can he still legally perform his functions under his commission ?

"On the fall of the Russian Imperial Government consuls were appointed by Kerensky, and on his fall in turn consuls were ap-appointed by the Lenin and Trotsky Government. The latter has not been recognised by Great Britain, nor by the officials, diplomatic and other, appointed by Kerensky. It is true that with the fall of the latter some consuls resigned, notably the Consul-General for Birmingham, but as a rule the consular officers appointed by Kerensky still regard themselves as bound by their commissions to carry on their functions and, in an informal way perhaps, to continue to look after the interests of Russian subjects in this country. It is understood, for instance, that M. Onou, who was appointed by Kerensky Consul-General in place of Baron Heyking, claims to be still the Russian Consul-General. The British Government, having declined to recognise the Lenin Government, naturally refused to receive M. Litvinoff as its ambassador. He has, it is believed, been recognised as an agent only to this extent, that persons desirous of proceeding to Russia are recommended to apply to him to visé their passports."

NOTES ON CASES.

QUEBEC.

[*Contributed by* PROFESSOR R. W. LEE, D.C.L.]

Authority of Decided Cases.—In a former number of this Journal [1] reference was made to the case of *Durand* v. *Bernier*,[2] in which Lemieux C.J. declined to follow the plain authority of a decision of the Supreme Court of Canada. His decision, as was to be expected, has been reversed by the Court of King's Bench sitting in appeal.[3] The conclusion is that though, unlike Ontario,[4] we have no legislation on the subject, the authority of decided cases is much the same in Quebec as in the other Provinces of Canada.

Copyright Acts: Right of Dramatic Representation.—In *Joubert* v. *Géracimo* [5] the Court of King's Bench considered a claim to recover a statutory penalty under the Dramatic Copyright Act, 1833 (3 & 4 Will. IV. c. 15), s. 2, which, it was argued, was still law in Canada, at any rate as regards the right of dramatic representation as distinct from copyright, by virtue of the International Copyright Acts, 1886 and 1844, and the Copyright Act, 1842. The Court decided that the claim was well founded. Pelletier J. dissented, partly on grounds of construction, but mainly on the ground that "un sujet canadien" should be solely amenable to "la loi canadienne." His Lordship's remarks on this head seem to overstep the *exiguus finis* which separates law from politics.

Marriage of Minors without Consent of Parents.—According to Voet (23. 2. 11) in the Roman-Dutch Law an aggrieved parent can have such a marriage annulled "si rigido jure uti velit." The law

[1] Journal, vol. xvi. p. 357.
[2] Rapports Judiciaires de Québec, 49 Cour Supérieure 217.
[3] R.J.Q. 25 Cour du Banc du Roi 461; 32 Dominion Law Reports 768.
[4] See Revised Statutes of Ontario, 1914, c. 56, s. 32.
[5] R.J.Q. 26 C.B.R. 97.

is the same in Quebec. In *Guttman* v. *Goodman* [1] the Court held that a father who brings an action to have the marriage of his minor son annulled on the ground that it was contracted without his consent has the right to continue his action even if his son comes of age pending the suit.

Fausse Arrestation.—In a case of malicious arrest the Court brought the defendant's liability under the general principles of C. C. 1053, by which "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill." In other words, the liability depends upon proof of *dolus* or *culpa*. It is not necessary to prove malice as in English law. It was formerly held that since the criminal law of Canada is essentially English, the law of "false arrest" must follow the English law. But this view is no longer entertained (*Fabyan* v. *Tremblay*).[2]

Fisheries.—Important constitutional questions were raised before the Court of King's Bench [3] on a reference from the Lieutenant-Governor in Council under Revised Statutes of Quebec 1909, Art. 579. Although by Quebec law the functions of the Court in regard to such references is merely advisory and there is no appeal, this particular question has been made appealable to the Privy Council by Act 6 Geo. V. c. 10. The questions referred raise the issue whether it is competent to the Provincial authorities to grant exclusive fishing rights in tidal waters and in the high sea within the three-mile limit. On behalf of the Dominion it was contended that the proprietary rights of the Provinces recognised by the *Fisheries case*, [1898] A.C. 700, extend only to non-tidal waters and that as regards tidal waters and the waters of the sea the principles of decision are to be found in the *British Columbia Fisheries Reference case*, [1914] A.C. 153. The Court (Cross J. dissenting) decided in favour of the Province, holding that the question depended wholly upon French law and the statute law of the Province. However, as regards the question of fishing upon the high sea, following the course indicated by the Judicial Committee in the *British Columbia case*, the Court refrained from expressing any opinion.

Territorial Jurisdiction of the Parliament of Canada.—In *Canadian Pacific Ry. Co.* v. *SS. Storstad*,[4] Mr. Justice Maclennan, sitting as

[1] R.J.Q. 26 C.B.R. 270.
[2] *Ibid.* 26 C.B.R. 416.
[3] *Ibid.* 26 C.B.R. 289.
[4] 34 D.L.R. 1.

Deputy Local Judge in Admiralty, found that the collision between the *Empress of Ireland* and the *Storstad* having taken place at a distance of more than three marine miles from the Canadian coast, and therefore upon the high seas, the law applicable was the law of England and not the law of Canada. Accordingly claims for loss of life were to be preferred to other claims in terms of the Merchant Shipping Act, 1894, s. 503. This decision has been appealed to the Supreme Court.

Droit de Réméré: Interpretation of Civil Code, Art. 1550.—The interest of *Johnson* v. *Laflamme*,[1] a case which came before the Supreme Court of Canada in appeal from the Quebec Court of King's Bench, consists in the difference of opinion to which it gave rise on a question of interpretation. Art. 1550 of the Civil Code relates to the vendor's " droit de réméré " or " right of redemption," and enacts in the French and English versions respectively as follows: (French) " Faute par le vendeur d'avoir exercé son action de réméré dans le terme prescrit l'acheteur demeure propriétaire irrévocable de la chose vendue." . . . (English) " If the seller fail to *bring a suit* for the enforcement of his right of redemption within the stipulated term the buyer remains absolute owner of the thing sold." The Court (three to two), following the construction placed upon the identical Art. 1662 of the French Code, and the course of decision in the Province of Quebec, interpreted the words " exercé son action " as covering any signification of intention to redeem. The Chief Justice (Sir Charles Fitzpatrick) treated the English version " bring a suit " as a mis-translation. On the other hand, Anglin and Duff JJ. took the view that since there is no patent discrepancy between the English and French versions, both being in the absence of discrepancy equally authoritative, it was not incumbent upon the Court to interpret them in any but the literal sense.

Dominion Companies: Debentures. Law of Quebec.—The case entitled *In re The Dominion Marble Co. Ltd., in Liquidation, and Scott, Liquidator*,[2] raised a question of great importance to all Dominion trading companies. To secure payment of its bonds or debentures the company had issued a trust deed naming the Prudential Trust Company trustee for the bond-holders. It then proceeded to hypothecate, mortgage, and pledge to and in favour of

[1] 54 Can. S.C.R. 495, 36 D.L.R. 572. [2] Not yet reported.

the trustee " all the property of the company real and personal, etc., held or enjoyed by the company or which at any time hereafter, during the continuance of this security, may be acquired, owned, held or enjoyed by it." The company having gone into liquidation, the claim of the Trust Company to preference as hypothecary creditor was resisted on the ground that the above clause, though authorised by the Dominion Companies Act, was inconsistent with the civil law of the Province in relation to the pledge of moveables; and that it was not competent to the Dominion Parliament to authorise the company to issue debentures in terms which failed to recognise the exclusive right of the Province in regard to " Property and civil rights." On a special case submitted by the parties, Greenshields J. was asked to decide the following questions:

(*a*) Had the company in liquidation power and authority in virtue of the Companies Act, c. 79 of the Revised Statutes of Canada, to create in favour of the Prudential Trust Company, Limited, trustee for its bondholders, a privilege upon its moveable property?

(*b*) If the company in liquidation had power and authority to create such privilege, would the privilege extend to moveable property acquired subsequent to the execution of the deed creating the same, or would it be restricted to the property acquired and owned by the company at such time?

The learned judge decided that the company in liquidation had not the power to create a privilege upon its moveable property. This amounts to saying that the chattel mortgage clause commonly inserted in the charters of Dominion companies is ineffectual in the Province of Quebec.

AUSTRALIA.

[*Contributed by* James Edward Hogg, Esq.]

The Copyright Act, 1911.—The Australian case of *Robinson* v. *Sands and McDougall*[1] was noticed in a previous number of this Journal.[2] It was held that a map compiled from ordinary sources of information open to other people was nevertheless the " original " work of the compiler, and so entitled to the protection of the Copyright Act. It is satisfactory to find that this decision has on appeal

[1] (1916) 22 C.L.R. 124 (Barton J.). [2] *Jour. Comp. Leg.* xvii. 274 (Nov. 1917).

been upheld by the High Court of Australia in *Sands and McDougall* v. *Robinson*.[1]

Use of Land as "Income."—*Harding* v. *Federal Commissioner of Taxation*,[2] though dealing with Australian Income Tax Acts, should be read by all English lawyers and others who are interested in the subject of income tax law. The case is indeed a useful pendant to the English reported cases. The question for decision was whether "five per centum of the capital value of land and improvements thereon owned and used or used rent free by the taxpayer for the purpose of residence," etc., which by one statute was to be deemed "income," was "income derived from property," and so taxable as income under the Income Tax Act. The Court came to the conclusion that this "five per centum," etc., was such "income" and taxable, and the taxpayer who had appealed failed in his appeal accordingly. One is reminded of Lord Macnaghten's remarks in *London County Council* v. *Attorney-General*:[3] "Income tax, if I may be pardoned for saying so, is a tax on income. . . . One man has fixed property, another lives by his wits; each contributes to the tax if his income is above the prescribed limit." This and other cases were cited in the Australian case, but the judgments might perhaps have been concentrated into the above dictum of Lord Macnaghten.

"Judicial Notice" of well-known facts.—The High Court of Australia, in *Holland* v. *Jones*,[4] found it necessary to decide that judicial notice could be taken of the personality of a Minister of the Crown. The pith of the single judgment read by Isaacs J. is contained (as to this point) in two paragraphs, which will bear quotation in full:

> The only guiding principle—apart from statute—as to judicial notice which emerges from the various recorded cases appears to be that, wherever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it, the Court "notices" it, either *simpliciter* if it is at once satisfied of the fact without more, or after such information or investigation as it considers reliable and necessary in order to eliminate any reasonable doubt.
>
> Applying these observations to the present case, it would be mere idle affectation for an Australian Court not to "know"—more particularly

[1] (1917) 23 C.L.R. 49.
[2] (1917) 23 C.L.R. 119.
[3] [1901] A.C. 26, at p. 35
[4] (1917) 23 C.L.R. 149.

in war-time—who is the Minister for Defence. He is one of the Ministers of State for the Commonwealth referred to by s. 64 of the Constitution. His appointment and public duties are matters of universal Australian concern.

Resulting Trust.—In *Perpetual Executors' Association* v. *Wright* [1] a husband, who had transferred property to his wife in order to place it beyond the reach of creditors, was successful in reclaiming the property from the wife's executors on the strength of her written declaration of trust in his favour. The case is useful as pointing the distinction between recovering property in these circumstances, where nothing had been done in the way of defeating any creditors, and attempts to recover which would be unsuccessful if the intention to defeat creditors had in any way been effectuated.

War Moratorium and Mortgages.—A mortgagee had obtained judgment against his mortgagor before the making of the Moratorium Regulations, and subsequently to these Regulations coming into force applied for leave to enforce his security by sale or foreclosure. This leave was refused: *In re Allen*.[2] No English cases were cited.

Trading with the Enemy.—*Rex* v. *Snow* [3] is an important and instructive case before the High Court of Australia, in which all the relevant authorities as to "trading with the enemy" appear to have been reviewed. A narrower view of the meaning of this phrase had prevailed in the State Supreme Court of South Australia; but the Appellate Court held unanimously "that neither transportation of goods nor contract is essential to the commission of the offence of trading with the enemy at common law, and that communications for the purpose of conserving existing, or promoting future, business relations constitute that offence."

Conflict of French and English Law.—The doctrine of the *renvoi* was referred to in a recent case in the Supreme Court of New South Wales: *Simmons* v. *Simmons*.[4] A British subject, having his domicil in New South Wales, left that State and acquired a *de facto* domicil in New Caledonia (a French possession). He did not, however, under French law, acquire a *de jure* domicil in New Caledonia. The question arose, on his death, whether succession to his movable property in New South Wales was to be governed by

[1] (1917) 23 C.L.R. 185.
[2] (1917) 23 C.L.R. 220 (Isaacs J.).
[3] (1917) 23 C.L.R. 256.
[4] (1917) 17 S.R. (N.S.W.) 419.

English law generally, New South Wales law, or French law. It was held that New South Wales law applied, as being "the internal law applicable in that part of the British Empire in which the deceased had his domicil before he fixed his residence abroad."

INDIA.

[*Contributed by* SIR ERNEST TREVELYAN.]

Evidence of Purdanashins.—The testimony of Hindu and Mahomedan ladies who according to the custom of the country do not appear in public is sometimes required in Courts of Justice in India.

In civil cases the Courts have ample powers to allow the evidence of these ladies to be taken by commission, and frequently give such permission. In criminal cases it is by no means certain that the Courts have power to issue a commission simply on the ground that the witness is a "purdanashin," *i.e.* a lady who according to the custom of the country does not appear in public, but a Court would take such steps as are necessary to prevent the lady's right to seclusion being outraged more than is necessary for the ends of justice.

Sometimes ladies do not insist on a commission, but are brought into court in a closed palanquin, and give their evidence sitting therein, and speaking through a chink in the door of the palanquin. In some cases ladies do not mind coming into court, but keep their faces veiled while they are in court.

When being asked to make an order for a commission the Court is sometimes faced by the fact that the lady has herself defied the rules of her class, and has on one or more occasion appeared unveiled in public. The last case on this subject is that of *Balakeshwari Dabee* v. *Jnananda Banerjee*,[1] which has affirmed earlier cases on the same subject. The question in each case is whether the lady has so altered her mode of life as to have abandoned any claim to the protection of s. 132 of the Civil Procedure Code (Act 5 of 1908), which enacts as follows: "Women who according to the customs and manners of the country ought not to be compelled to appear in public shall be exempt from personal appearance in court."

"Gains of Learning" not Joint Family Property.—The legislature

[1] (1917) 22 *Calcutta Weekly Notes* 197.

is very averse to interfering with Hindu law, even when the voice of the more enlightened Hindus require some reform. Occasionally it is possible for the Courts of Justice to free the law from the rigidity of ancient texts, and to make it more in accordance with the present practice and views of the Hindus.

In *Matharam Ramrakhiomal* v. *Rewachand Ramrakhiomal*[1] the Judicial Committee has adapted ancient texts to modern requirements.

Under strict Hindu law all the property earned by a member of a joint family governed by the Mitakshara School belongs to the joint family, if the family property has been in any way used in the acquisition.

In the present case a member of a joint family received an ordinary education at the expense of the family, but received no special education. He became clerk to a pleader, and afterwards a broker, and also carried on a money-lending business. From those occupations he acquired property, which was claimed as belonging to the joint family.

If this claim had been successful no professional man would be able to claim his earnings as his own, unless he were to separate from the family.

Some years ago an attempt was made in Madras to rectify this injustice, but the Madras Gains of Learning Bill did not become law. The decision in the above case has made it clear that the law is as follows: an ordinary education at the expense of the family does not affect the earnings of a professional man. Should he have received at the expense of the family a special education for his profession, as for the Bar, medicine, or the civil service, his earnings are apparently family property unless he separates from the family.

[1] (1917) L.R. 45 Ind. App. 41.

NOTES

Divorce in Canada.—An important point is raised by an interesting article in the *Canadian Law Times* of October 1917, by Mr. Bram Thompson, viz. whether there is a law of divorce in Saskatchewan and other Western Provinces. It will be remembered that marriage and divorce are within the exclusive powers of the Dominion Parliament by the British North America Act, 1867. The Western Provinces have been constituted out of Rupert's Land and the North-West Territories by separate statutes for each, Saskatchewan by Act 4 & 5 Ed. VII. c. 42. The North-West Territories Act[1] established for them the laws of England as to civil and criminal matters as at July 15, 1870, so far as not repealed or varied by Imperial Acts or Canadian statutes or ordinances of the Territories. By the Saskatchewan Act all laws and all courts of civil and criminal jurisdiction, all judicial power and authorities existing in the Territories thereby established as the new Province were continued, subject to the same rights of repeal and alteration by Canadian statutes or Provincial Acts. The author contends that this conferred on the Province the English law of divorce, and cites in favour of this view the fact of the Province passing an Act in 1911 re-establishing the common law right of action for *crim. con.*, which was abolished in England by the Divorce Act, 1857. He claims in the next place that the Supreme Court of Saskatchewan has the power of adjudicating in divorce by the reason of the Supreme Court of the North-West Territories having been given, by the North-West Territories Act, within the Territories and for the administration of the laws of the time being in force within them the powers incident to a superior court of civil and criminal jurisdiction in England as at the given date, and in particular the rights, incidents, and privileges employed and exercised as at that date by the English courts of common law or the Court of Chancery or the Court of Probate; and then by

[1] 43 Vict. c. 25.

virtue of the Saskatchewan Judicature Act, in addition to the powers of the Supreme Court of the North-West Territories, the power of the English Courts of Chancery, Queen's Bench, Exchequer, and Probate, including any jurisdiction which prior to September 16, 1907, was capable of being exercised by the Supreme Court of the North-West Territories, and the jurisdiction in England prior to the Judicature Act, 1873, which was vested in or exercisable by any of the Courts above mentioned. He suggests that the expression "Probate Court" may have been used by the legislature to include the Divorce Court; that the reference to the English Courts named in the Supreme Court of the North-West Territories Act did not refer to the jurisdiction itself, which is already prescribed by the words "for the administration of the law for the time being in force," but was only directory and illustrative, for none of them had the combined jurisdiction over the entire body of English law which was given to the North-West Territories as at July 15, 1870: that the Divorce Court is included in the expression "courts of common law" because it administered part of the *lex non scripta* of the common law; and in conclusion he urges that the absence of divorce law in Canada is harmful socially, and has caused Parliament to descend to the gruesome work of allowing divorce by private bills, which he regards as unconstitutional, and he would have the Western Provinces, to whom divorce has been denied for the sake of uniformity because it was thought expedient to do so for the Eastern Provinces, claim their right to this power.

Setting aside any argument based on the ancient law of England as to divorce as a common law right—as regards which the author's account of it does not show that the common law, if it includes the ecclesiastical law, allowed divorce *a vinculo* except for causes justifying a sentence of nullity—one chief objection to the author's contention seems to be that the grant of a special jurisdiction is based on implication from general words only in a constitutional or a judicature act, and not on express provision, and seeing that the jurisdiction does not exist elsewhere in the Dominion (except in British Columbia, which is referred to later) the presumption would be against such a grant being intended, and this presumption is justified by the specific references to the English Courts *nominatim*, among which the Divorce Court is not included.

Another weighty ground of objection, among others, put by

another correspondent to the same journal (Mr. G. S. Holmested), is that the British North America Act, 1867, has a governing position in the matter of all jurisdictions derived from its source and limits them to its scope, and as it differentiates between "Marriage and Divorce" and "Civil Rights" the equivalent of the latter term cannot be held to include the former.

The author, however, has a stronger ground in the decision of the Privy Council in *Watts* v. *Watts*,[1] in which it was held that, in the case of British Columbia, which was constituted a Colony in 1858, general words introducing the civil law of England as at that date were sufficient to confer the jurisdiction under the English Divorce Act, 1857, upon the Colonial Court. As regards this it is noteworthy that before this decision the authority of Gemmill on *Divorce in Canada* was against the view that the special jurisdiction was conferred by implication from general words. Moreover the general words are wholly different from the present case, and the status of that Province is anterior to and therefore not subject to the governing influence of the British North America Act. It certainly seems safe under these circumstances to treat the claim to exercise this special jurisdiction—the expediency of which is still the subject of much controversy—as non-proven.

The "'Athenæum' Subject-Index of Periodicals."—The issue covering the year 1916 of the section of the "*Athenæum*" *Subject-Index of Periodicals* dealing with the historical, political, and economic sciences is a comprehensive and valuable work of reference. The development of aeronautics, however, has been so rapid that the compilers have not been able to keep pace with it. Under that title, although it includes military aeronautics, there is no reference either to the Royal Flying Corps, which can be found under "England, Army" or to the share of aerial warfare in the European War, which has to be sought under that heading. The operations of the allied service are hidden under the title "England: Navy—Air Service." Since there are no cross references as guides from one to the other, it is only after some research that one can find the various entries. It is to be hoped that the compiler of the 1917 issue will follow the example of the Government, and bring together these separate units. Other subjects which have developed rapidly since the scheme of the index was determined, might receive considera-

[1] [1908] A.C. 572.

tion on similar lines. The execution of the index, so far as there has been opportunity to test it, seems to be admirably accurate. One slip may be noticed. It occurs under the title Courts : Canada, where there is a reference to a report by Dr. Josef Redlich which has no connection with that subject, but refers to Legal Education.

Judicial Recall.—In the remarkably varied and interesting contents of *The American Bar Association Journal* for January is an alarming article by Mr. Rome Brown upon " Socialist Menace to Constitutional Government." Mr. Brown gives many examples of what he calls the " menacing monster of Socialism, stripped of its mask of peace, showing its brutal teeth and its iron hand." He lays particular stress upon the " Judicial recall as an instrument of Socialism " :

> It is significant of the menace of Socialism to our institutions that, beginning with Oregon in 1908, the recall of judges was written into the constitutions of California in 1911, Colorado in 1912, Arizona in 1912, Nevada in 1912, and Kansas in 1914 ; and that in Colorado the same constitutional amendment provides for the recall of judicial decisions. Moreover, in many other states the judicial recall has been proposed for constitutional amendment and has been introduced in the state legislatures and received substantial, and in some instances nearly successful, support. In Arkansas, a constitutional amendment for the recall of judges, which was initiated by the people, was passed at the 1912 election, but was invalidated by the State Supreme Court on the ground that it had not been properly submitted to the people. While now apparently discredited, through increased understanding of its real significance, the judicial recall is still advocated by the Socialists and their allies as an instrument for striking at the very foundations of our government. To the Socialists it is the first feasible step for destruction of our present system of government. The Socialist organ, *Appeal to Reason*, referring to the judicial recall, has said : ' It is the means whereby the people will be enabled to inaugurate Socialism, and after that is done they may secure democracy in industry.' "

" Year-Book of the Carnegie Endowment for International Peace, 1917." [1]—The importance of the work carried on by the Trustees of the Carnegie Endowment Fund cannot easily be over-rated. Whilst the activities of the Trustees have been curtailed in some fields of its operations owing to the war, the same factor has caused a con-

[1] *Year-Book of the Carnegie Endowment for International Peace*, 1917. (Headquarters of the Endowment, Washington, D.C., United States of America.)

siderable increase in the work of the department concerned with international law.

The Report of the Director of the Division of International Law, Dr. James Brown Scott, will be read with interest not only for its record of work done, but also for its statement of the principles upon which that work has been based. Dr. Scott reminds us that there is no royal road to peace. Peace to be permanent can only come in the train of justice. Nations must therefore agree upon principles of justice, embody them in rules of law, and create agencies for their passionless application to all disputes of a justiciable nature. In the scales of justice right not might prevails. Just as in civilised States the rule of law is paramount, and rights are coterminous with duties, so between nations the rule of law must prevail, since there cannot in the long run be two standards of justice, one for the individual, another for the nation; two standards of morality, one for the individual, another for the nation; two standards of conduct, one for the individual, another for the nation. As an abstract proposition few will be found to deny it. The difficulty arises when the moment of its application arrives. Dr. Scott puts his finger on the spot.

A State which is regarded as the creator of the law is superior to the thing which it has created. It is above the law. It has no master, it is not responsible to any one. Such a State lays stress upon its rights; it does not lay stress upon its duties, because it has all the rights which it is strong enough to maintain and only those duties which it cares to concede. Although Dr. Scott does not say so, such is the conception of the State apparently held by the peoples of the Central Powers. The true conception in Dr. Scott's view is that embraced by the Declaration of Independence of the United States. Under the American Constitution the State is the agent of the whole people, not its master. It is, says Dr. Scott—

> an artificial person created by actual persons for their benefit, to secure to them the enjoyment of those rights which they deem necessary or advisable; it is subject to the law of its creation, and the government created to secure the enjoyment of these rights can only exercise the power granted for this purpose.

But the form of constitutional government is no guarantee

against internal ills or external attacks. To reap the fruits of justice the peoples must be educated in the principles of justice. Whilst insisting upon their rights they must acknowledge and perform their duties. As Mr. Root has well said, modern democracy has a tendency to realise its rights in advance of its realisation of its duties That way lies disaster.

"The Rule of Law during the War." [1]—Under this title is published the Bowen Prize Essay in the University of Melbourne by Mr. R. G. Menzies, in which the relations of the Rule of Law during the war are discussed both in its constitutional and international aspects. It is of good omen for those who believe in the reign of law both within and without the State as opposed to the German doctrine of State policy, that from two cities so far apart as Washington and Melbourne public attention should be directed to the study of this question, so vital to the future of democratic government. To the ordinary citizen international law and the Rule of Law have seemed subjects only fit for discussion in the class-room and almost outside the range of everyday ideas. If the present war does nothing else, it will show him the value of that right to personal liberty which he has regarded for so long as a matter of course, and of all those rights under the law of nations which, if he thought about them at all, he conceived as immutable.

Divorced Women.—In the number of *International Law Notes* for September—December 1917 there are two interesting articles dealing with the proper name of the divorced woman and "legal widows" which have a bearing on the article on "The Nationality of Married Women" in the preceding number of this journal. In the first, Dr. Heinrich Giesker-Zeller, Privatdozent in Zurich University and Rechtsanwalt at Zurich, points out that in most countries the divorced wife resumes her former name—though not in England [2]: and that in the absence of any international convention as to the law governing the status of the divorced wife—for the Hague Convention does not touch the consequences of divorce—and the divergence of views held in the different States, *e.g.* the French jurisprudence

[1] *The Rule of Law during the War.* By Robert Gordon Menzies, LL.B. With a Foreword by Professor W. Harrison Moore, Sydney. (The Law Book Company of Australasia Ltd., 1917.)

[2] The subject is discussed at length by Mr. J. E. G. de Montmorency in the last appendix to the Report of the Royal Commission on Divorce (1912).

taking the spouses' national law as the basis and the German and Swiss holding that the consequences of divorce are subject to the law under which the divorce was pronounced, the author holds that the national law should be given an unqualified preference because the name represents a highly personal property, which should not be subject to the chances of territoriality, but should be ascertainable with certainty. The Swiss Courts in practice frequently pronounce divorces according to the Hague Convention, and as these have to satisfy both the *lex loci* and the national law, they would require both to be complied with in this respect; and in the case where the spouses have not the same nationality the law of the last common nationality should govern.

In the second article Mr. Brinsley Harper deals with the English law on the matter as stated in the *Cowley* case, viz. that there is nothing to prevent the divorced wife from using any name she chooses, provided that this does not deceive or inflict a pecuniary penalty, and he suggests that the proper solution is for the wife to retain her husband's name and be regarded as a "legal widow."

On principle it seems clear that this question as being an effect of divorce should be governed by the law governing the divorce. This would be, generally speaking, the personal law, but the *lex loci* must necessarily often decide the consequences which will take place; and our own law so holds with regard to such questions as alimony and custody of children and the property rights of the divorced spouses, even in the case of persons domiciled abroad. The family name may be regarded as a symbol of the status which the wife acquires by marriage, like the capacity for certain acts and the proprietary rights, but it seems difficult to make any distinction as to her right to retain it according to whether she is the innocent or guilty party, though in the latter case she may be said to have forfeited her right to it; and probably on the whole the rule of our law is the most practical solution.

Duguit's "Law and the State."—Mr. H. J. Randall writes: "The issue of the *Harvard Law Review* for Nov. 1917 (vol. xxxi. No. 1) consists entirely of a translation of a short work by M. Léon Duguit, Professor in the University of Bordeaux, on 'The Law and the State; French and German doctrines.' The translation appears to have been done admirably; and a note by Mr. Harold J. Laski

provides a great deal of information about M. Duguit's theories and their relation to contemporary thought in France and England.

"The work, which was completely prepared before the outbreak of war, merits every consideration at the present time. The general question that it examines can be stated in a few words, viz. is there or is there not a jural principle (*une règle de droit*) superior to the State by which the action of the State must be limited and controlled? M. Duguit is a lawyer and is perfectly clear about the object of his search. He is not looking for an ethical rule to which law may be expected to conform, nor a principle of political action which politicians may be expected to follow when they dare not disregard it; but a true jural principle underlying and supporting the arguments of jurists and the judgments of Courts. As he puts it (p. 5):

> "It is not a question of determining whether or not any one of its departments is bound by law, but of ascertaining whether the State itself, whatever be the department that intervene, is limited in its action by a jural principle to which it is subjected—that is by a principle which subjects it both to positive and to negative obligations, and having a sanction capable of being socially organised.

"Following this out, M. Duguit analyses the various theories of State action that have obtained favour in France and Germany from the time of Rousseau. He classifies them broadly as the metaphysical doctrines, which go back to Rousseau and his medieval predecessors, all based on the assumption that the State has a personality distinct from that of the individuals that form it; and the realistic theories which deny this assumption and the consequence that flows from it that the State possesses a will of its own. The author himself is a strong advocate of the realistic principle and a merciless critic of the whole theory of sovereignty. In other works,[1] of which one hopes that English translations will soon appear, he has purported to discover the jural principle that is to form the basis of public and international law in social solidarity or social interdependence, and he sets out this doctrine briefly at the close of the present book.

[1] A critical study by Dr. Jethro Brown of his work "Les Transformations du Droit Public" was published in the *Law Quarterly Review* (vol. xxxii. p. 168) under the title "The Jurisprudence of M. Duguit."

"It would clearly be impossible to criticise such a work as this within the limits of a note, but one or two random observations may be allowable.

"In the general revolt that is in progress everywhere outside Germany against the extreme doctrines of State sovereignty, it is curious to observe the re-emergence of medieval methods of thought. The principle of sovereignty, as we know it, is essentially a product of the Renaissance and the Reformation. It was first systematically expanded in Bodin's *De La République*, but the theory that the State is power may be found in the earliest and greatest of the Renaissance publicists—Machiavelli. Now writers like M. Duguit are working their way back to principles that are strangely akin to the medieval conception of a Law of Nature, and to the medieval doctrine that the law is above the king, not the king above the law. The Renaissance thinkers spurned these principles absolutely, but they are reappearing once more, though possibly under other names and in different garments.

"M. Duguit's jural principle of social interdependence is somewhat difficult to realise completely. It is in the first place a statement of a fact that can be established by observation, and as he very candidly admits, the most serious objections to his theories all come to this, that a statement of fact is not a jural principle. He answers in effect that the jural principle is nothing more than a precept to conform one's self to the facts, that is to say, to act in one way because it is social so to do, and to refrain from acting in another way because it is anti-social. The position may be made clearer in the author's other books, but it is not at all obvious from the present one whether it is intended to be a statement of a rule of law or of an ideal to which law should conform. There is a world of difference between the two. A general legal principle, like the doctrine of consideration in the English law of contracts, can be quoted in court and made the foundation of a legal argument in a particular case; but the statement of an ideal can only form the foundation for projects of legislation and reform; it purports to say what law should be, not what it is.

"To an English reader this principle of social solidarity or interdependence sounds very like an echo of Bentham's 'greatest happiness of the greatest number.' But Bentham makes it perfectly clear that his greatest happiness principle was a principle of

legislation, a criterion to which laws should conform and by means of which their value could be ascertained; he never attempted to say that it was an existing rule of law."

Pre-War Contracts.—A Committee of which Lord Buckmaster was Chairman was appointed by the Board of Trade to consider the position of British manufacturers and merchants in respect of contracts entered into prior to the war with persons or companies in the United Kingdom or in allied or neutral countries, the fulfilment of which has been prevented or impeded by the war.

The materials examined by the Committee in their report [1] cover about 600 contracts and " shows that the extent of the interference with trade conditions is widespread, so that unless goodwill and forbearance is shown by parties who will have the right to claim damages grave difficulties may arise." Of the contracts within the terms of reference about half were between British subjects both of whom traded in the United Kingdom and half between a British subject or firm and another party in an allied or neutral country. There was no contract from the organised produce markets nor from the textile trades or cotton brokers, but the immunity of the cotton class " may have been due to the passing of the Act 5 & 6 Geo. V. c. 69, known as the Cotton Association (Emergency Action) Act, 1915, which regularised the alteration of dates for delivery." The position altogether is better than had been expected owing to the " spirit of reasonableness " shown between traders. The Committee say: " We cannot too strongly emphasise our opinion that the best possible solution of the difficulties we have been considering lies in the extension of this spirit of compromise. We are confident that as it has already solved many of them it will solve most of those that remain " and they add that public bodies " have power to act and ought to act as reasonably as business men would do in similar circumstances, and we venture to suggest that some departmental action may be desirable to achieve this result." The Committee proceeds to set forth the position under the common law and under the statutes passed since the outbreak of war, and the various remedies for existing difficulties suggested by witnesses. The Committee are unable to recommend relief by legislative cancellation of pre-war contracts, nor are they prepared to recommend Government compensation, save when the loss is due to direct govern-

[1] Parliamentary Paper Cd. 8975, King's Printers, 1*d*.

mental interference, but they see no reason why the Inland Revenue and the Ministry of Munitions should not continue without further legislation to write off future loss against payments in respect of excess profits.

With respect to remedy by revision of contracts, the Committee repeat their view that "every one of these trade disputes ought to be settled by the parties, as we find it difficult to think of a case where if such settlement be not made one party or the other could escape the blame of having failed in his duty to the State." In regard to contracts with foreigners or British subjects beyond the seas, the Committee do not think that it is desirable or possible to diminish or impair the contractual rights of these persons by municipal legislation. It could only be done by international convention, or for suitable cases by Imperial agreement. In the case of home contracts the Committee are not in favour of a Statutory Board of Arbitration, but would extend to all contracts the power already conferred in special circumstances by the Act of 1917. "It is only in this direction that any legislation could reasonably proceed; but we find ourselves unable to advise that it is desirable that such legislation should instantly be set on foot."

Nationality of Married Women.—With regard to the article in the November number of this Journal the Under Secretary of State for Canada writes to point out in connection with the reference to the Canadian law (p. 167) that (1) a woman originally a British subject, who by marrying an alien has lost her original nationality and whose marriage has been dissolved by the death of her husband or otherwise, can recover British nationality without fulfilling the ordinary condition of five years' residence, or (2) a woman who marries a British subject and whose husband after the marriage changes his nationality, can retain British nationality by declaring her intention to do so. He also points out that these provisions were not included in the original Bill before the British Parliament which was adopted by the Canadian Parliament and passed into law on June 12, 1914. The Bill was afterwards amended as above indicated and the Imperial Act passed on August 7, 1914, and at the desire of the Imperial authorities the amending Canadian Act was passed in order to bring Canadian law into conformity with our own.

A rather interesting question has arisen in the cases of Canadian women who have married citizens of the United States, and who

subsequently on the death of their husbands return to Canada. Under the law of the Dominion, as well as of the United States, a Canadian woman who marries a citizen of the United States changes her nationality, and becomes a citizen of the United States. There is a provision in the laws of the United States that a person who acquires nationality otherwise than by birth, and subsequently leaves the United States, loses nationality if he does not register with the American Consul within two years. Since the war began, a number of cases have arisen where a woman desired a passport, and it appeared that under the provisions above indicated, where the woman had married a citizen of the United States and returned to Canada on the death of her husband, she could not obtain a passport, either through the Canadian Government or the United States Consul. For these and other similar reasons it was found necessary to modify s. 20 of the Canadian Naturalisation Act, 1914, which provides that three months' notice of an application for naturalisation should be given. This will be found in the Order in Council of October 20, 1917, passed under the War Measures Act.

In connection with the same article, Mr. T. C. Young, Writer to the Signet of Glasgow, calls attention, as a matter which might have been noticed in it, to the provision of the amending Naturalisation Act, 1872, that the Act of 1870 should not deprive any married woman of any estate or interest in real or personal property to which she may have become previously entitled or affect it to her prejudice, and suggests that this was passed to meet the case of a native-born woman married to an alien being an owner of shares in British ships, which the 1870 Act disabled her from holding.

A Scheme for the Settlement after the War.—The meaning of the title of Mr. Jacobs' little book, *Neutrality* versus *Justice*,[1] is that the policy of neutrality towards belligerents is incompatible with international justice, or permanent international peace, and with the principle of mutual protection. The author is opposed to the "fetish of neutrality": the modern interdependence of nations requires the principle of mutual defence.

"The main scheme (writes Mr. C. E. Buckland) advocated by the author for the establishment and maintenance of the world's peace is a general defensive international alliance-treaty, as an initial

[1] *Neutrality* versus *Justice*. An Essay on International Relations. By A. J. Jacobs. (London: T. Fisher Unwin. 1s. net.)

stage, for mutual protection, by which the signatories (all the nations, if possible ; if not, all who are willing to join and to continue in the alliance) are to be pledged to declare war, and to meet with their entire military, economic, and moral force any invasion of the territory (including colonies, etc.) of any one of them. It is assumed (rather a large assumption) that the signatories will be ready to carry out their obligations, and the author considers his scheme to be practical and immediately practicable. It may be admitted to be practicable, in a sense, if all, or many of, the nations agree to adopt it: even in that case it does not appear to be more than a glorified defensive alliance of the kind of which history is full.

"But its effectiveness would be quite another matter. The author indicates that any signatory, shirking his obligations, would forfeit his claim to the advantage (the mutual protection) of the alliance-treaty, and suggests that the risk of losing this advantage would ensure his observance of the treaty. The conduct of Germany —a signatory of the treaty guaranteeing the independence of Belgium —in regarding it as a scrap of paper, is so fresh that no scheme, alliance-treaty, league of nations, or pact, which depends on the good faith of signatories, including possibly Germany, can be recognised as *sure* to be effectively binding on them. Unless an effective sanction is forthcoming, all such schemes are liable to break down, as international treaties dependent on the pledges of signatories have, as the author admits, been disregarded. Can any effective sanction be found ? Apart from a declaration of war, it might be possible to apply economic pressure on the offending nation, by commercial boycott, the closing of ports, and the immediate expulsion of the subjects (naturalised or not) of the offending nation. But such action on the part of the signatories must depend on their will to apply it. Can this be depended upon ? If good faith is not observed and will is not exercised, the scheme must fail and the problem becomes insoluble. How can good faith and the will to act be insured ?

"The author's scheme is also weak from the absence of machinery for its working, for it certainly will not work automatically, as the author appears to suggest. He is averse, for various reasons (delay, uncertainty, etc.), to anything like an international tribunal being *set up*, and therefore objects to a League of Nations, as its dependency upon such a tribunal places it, he says, outside the region

of practical politics. On the contrary, the idea of a League of Nations holds the field so far, but labours, not unnaturally at present, under a 'lack of precision,' and the machinery for making it effective has to be elaborated: whether absolute effectiveness is attainable under it has to be seen.

"The author expects his proposed mutual-protection-general-defensive-international-alliance-treaty to *evolve* inevitably a code, or system, of international law, and to *develop* certainly a competent tribunal with its executive body. How could such evolution and development (which obviously must take a long time) harmonise with the immediate practicability of his alliance-treaty? The author may well be invited to recast his essay, and it would be desirable that his views should be marshalled with greater lucidity and better arrangement."

Food Emergency Legislation.—The real want of a complete, co-ordinated and systematised collection of the large body of legislative documents relating to food supply and food production has been frequently referred to in both Houses of Parliament and elsewhere. That want has been met by the recent publication of two volumes, *The Food (Supply and Production) Manual* and *The Food Controller's Orders*,[1] which together comprise the whole of the Food Legislation as contained in Statute, Order, Regulation, or Departmental Circular to January 31 last. Both these books are edited by Mr. Alexander Pulling, C.B., the official editor of all the *Manuals of Emergency Legislation* issued since the outbreak of the war.

The main body of the *Manual* is divided into eleven parts. Of these the first three relate solely to the Ministry of Food and contain the Act constituting the Ministry, the Defence of the Realm Regulations enabling the Food Controller to make Orders, and the Orders made in pursuance thereof to October 21 last. In the three months which elapsed between that date and January 31 and after the earlier parts of the *Manual* had been printed off, the Food Controller made no fewer than 112 Orders, etc., as to particular articles of food.

All of these, and of the earlier Orders so far as in force on the last named date, are contained in *The Food Controller's Orders*,

[1] *Food (Supply and Production) Manual* (price 5*s.*, by post 5*s.* 6*d.*); *Food Controller's Orders* (price 3*s.* 6*d.*, by post 3*s.* 11*d.*), to be purchased from H.M. Stationery Office, Imperial House, Kingsway, London, W.C.2, or through any bookseller.

which also contains an epitome of the general Orders relating to food control committees and to enforcement of Orders and prosecutions, and thereby forms a revised edition to January 31 of Parts II. and III of the main *Manual.*

The later and remaining parts of the *Manual* are by addenda brought up to the same January date.

Of these Part IV. contains the Corn Production Act, legislation as to minimum price of wheat and oats and the consequential restrictions on raising agricultural rents, and the enactments and regulations as to minimum wages for agricultural workers, wages boards and committees.

As the editor points out, the "Enforcement of Cultivation" part of the Act has no present operation in England or Scotland. So far as regards England its place is taken by the Defence of the Realm Regulations and Orders of the Board of Agriculture, which with summaries of all the Board's Memoranda on Land Cultivation, etc., form Part V.

Parts VI. and VII. contain the corresponding Scottish and Irish legislative documents which in Ireland, but there only, operate concurrently with the "cultivation" provisions of the Corn Production Act.

Part VIII. gives the food powers of what may be termed the "Military" Departments.

Prosecutions for contravention of the food legislation are in the vast majority of cases "summary," and having this in view Mr. Pulling has in Part IX. severed the provisions relating to summary jurisdiction from those not pertaining thereto and grouped the whole of the trial and punishment law so as to facilitate ready reference.

The Documentary Evidence Acts have been so often extended that their reproduction in Part X. of the *Manual* in consolidated form so far as affects Food Orders will be found useful: as will also the grouping of the far-reaching enactments as to the effect of Departmental requirements on contracts which forms the concluding Part of the book.

The Appendixes cover a wide range, the Editor's plan being to give the full text of all the emergency legislation, and also an epitome of all the enactments, etc., which though not strictly forming part thereof are connected therewith. Thus he has reproduced the

Output of Beer Restriction Acts in consolidated form, and given epitomes of the legislation as to agricultural machinery, allotments, fertilisers and feeding stuffs, hay and straw, and many other matters, and of the restrictions on export and import of food. The many times extended provisions of the 1867 legislation as to offices of profit immediate succession from one to the other of which do not vacate a seat in the House of Commons are set out in simple form for the first time.

The *Manual* contains an eighty-page analytical index which covers both the documents, the editor's numerous notes, consolidations and summaries, and the addenda.

But the 600 pages which the highly complicated food legislation occupy call for a further key, and this is afforded by Mr. Pulling's Introduction. In this he gives a birdseye view of the whole legislation, and traces its initiation, referring to Parliamentary Debates and Committees' Reports. This Introduction co-ordinates and epitomises complicated legislation administered by a large number of Departments and affords a means of comparison between the local administrative food systems in force in the different parts of the kingdom: it accentuates the main lines of a largely novel system and brings into prominence the salient features of each set of provisions. The whole work constitutes an indispensable guide, prepared with the same skill and labour which have characterised previous publications of a similar character prepared by the learned editor, to a mass of legislation and administrative regulation controlling a most important part of the life of the country.

NOTICES OF BOOKS.

DIPLOMATIC PRACTICE.[1]

PROFESSIONAL diplomacy is, for the moment, in a condition of partial eclipse. It is not only that the activities of its agents are—as between the belligerents, who constitute by far the greater part of Europe and most of America—almost entirely suspended, so that a large number of them are more or less unoccupied, but that the mere fact of the outbreak of so universal and so appalling a war was considered, by a large portion of the public, to denote the bankruptcy of State diplomacy as a profession. Such a view is unjust, for, in the light of all we now know, we can clearly perceive that no diplomacy on earth could have prevented Germany from plunging the world into war at the moment which she had finally selected for the "tiger-spring" at France. Unfortunately, however, it cannot be denied that subsequent disastrous developments in the Balkans, Greece, and elsewhere deepened the unfavourable impression and increased general dissatisfaction. How far all these events are due to the personal shortcomings of individuals, to organic defects in the diplomatic systems of ourselves or our Allies, or to causes unconnected with either, this is neither the time nor the place to examine. Such questions are, by common consent, relegated to that happy era known as "after the war" when, apparently, all the problems which now perplex us will be satisfactorily solved. It may, however, be noted, in passing, that as far as we ourselves are concerned, a somewhat widespread impression appears to have prevailed in Parliamentary circles, some time before the war, that all was not well with our diplomatic machinery. This opinion was subsequently reflected in the Report of the Commission appointed to inquire into the organisation and recruitment of the Civil Service generally, which dealt, in a separate report, with the Diplomatic Corps and the Foreign Office, and declared that "in many cases there is room for improvement."[2] It made sundry recommendations, of which some were of a highly important and even drastic character, while others were considered by many of the

[1] *A Guide to Diplomatic Practice.* By the Rt. Hon. Sir Ernest Satow, G.C.M.G., LL.D., D.C.L. Two Vols. (Longmans, Green & Co., London, 1917.)

[2] See *Royal Commission on the Civil Service.* Fifth Report. Part I. The Diplomatic Corps and the Foreign Office (Cd. 7748), 1914, p. 18.

Commissioners to be insufficiently far-reaching. It remains to be seen what, if any, action will eventually be taken on the whole Report.

With these larger aspects of diplomacy, however, and its future destinies, Sir E. Satow's recent book makes no attempt to deal (save for a few words in the Epilogue), being sufficiently occupied with the elucidation, in two large volumes, of the numerous and abstruse branches of diplomatic science and etiquette which constitute the "practice" of the profession as it has hitherto prevailed. Considerations of space preclude a detailed review of its contents,[1] and it must suffice to say here that it is a valuable and learned treatise on a subject which has had, till now, no recognised textbook of its own in English: and being written by so distinguished and eminently qualified an authority, is doubtless destined to figure, in future, on the shelves of our Chanceries and become a classic in the profession,—for whom it is no doubt primarily intended, and for whom, indeed, considerable portions of its contents (as, for instance, the long lists of names of Representatives at former diplomatic Congresses[2]) can alone have much interest.

Nor is the research of which the book bears evidence, and the fund of curious, interesting, and often amusing historical information it contains, likely to be of less use to them in the future than it would have been in the past. Professor Oppenheim, in his preface, alludes to the impression prevailing in some quarters that international law is dead, and he quotes, most appropriately, in refutation of any such notion, a striking passage from the writings of the late Mr. W. E. Hall. In the same way, many people maintain, nowadays, that the acceleration of telegraphic communications, in modern times, has superseded the necessity for the maintenance of costly staffs of expensively educated diplomatists in every foreign capital. The question is, no doubt, to some extent one of degree, and it is, obviously, too large a one to be discussed here. But any one who has lived much in diplomatic circles, either at home or abroad (but par-

[1] It may, however, be worth while, for the benefit of future editions, to call attention to the following misprints, not included among the "errata," viz.: vol. i., p. 25, l. 5, "pourvû" for "pourvu"; p. 76, l. 23, "les roi" for "le roi"; p. 78, l. 34, "s'étant mutuellement communiqués les opinions," for "s'étant mutuellement communiqué les opinions"; p. 79, l. 25, "le transactions" for "les transactions"; p. 115, l. 23, "à grade égale" for "à grade égal"; p. 154, l. 31, "une attente" for "une atteinte"; p. 186, l. 3, "den Geschäften geübt haben" for "den Geschäfte geübt haben"; p. 218, l. 40, "les personnel" for "le personnel"; p. 221, l. 1, "l'Ambassadrices" for "l'Ambassadrice"; vol. ii., p. 191, l. 25, "den Angriffenen" for "den Angegriffenen"; p. 270, l. 20, "Mon Gouvernement consente" for "Mon Gouvernement consent"; p. 330, 1, 24, "interprétée" for "interprété"; *ibid.* l. 28, "n'attend" for "n'entend." There are doubtless others; but considering the mass of quotations, in no less than five foreign languages, which constitute a large portion of the book, the comparative scarcity of linguistic errors is highly creditable to the printers and the proof readers.

[2] Vol. i. pp. 101–71.

ticularly in small communities abroad) is aware of the extent—at times one feels constrained to say the deplorable extent, having regard to the magnitude of the interests at stake—to which the "personal equation" counts in all these matters, as well as the imperative necessity for the employment, in difficult situations, of verbal tact, conciliatory manners, and trained powers of negotiation and persuasion. There is, consequently, little doubt that the diplomatists will weather the present storm—or, perhaps one should say, emerge from the passing cloud—and prove themselves little, if at all, less indispensable in the future than they have been in the past.

A sound knowledge, therefore, of diplomatic history and precedents, such as this book provides, and of the traditional procedure adopted for dealing not only with the weighty affairs submitted to great diplomatic Congresses and assemblies of various kinds, but also with the innumerable and harassing little questions which arise, from day to day, in diplomatic life, will continue to be invaluable to them,[1] although the strenuous times before us will probably cause a considerable portion of the time and energy hitherto expended by diplomatists on the settlement of purely formalistic questions of precedence, diplomatic language, and official etiquette (which occupy considerable space in the present work) to be diverted to the study and solution of more important problems.

M. McI.

FEDERAL IMPEACHMENTS.

In the United States impeachments are conducted by the House of Representatives before the Senate, sitting as a Court: as impeachments were made in England by the House of Commons before the House of Lords. The brief prepared in connection with the impeachment, in 1912, of Mr. Robert W. Archbald, a United States Circuit Judge and Judge of the United States Commerce Court, for corruptly taking advantage of his official position to make money and receive sums of money wrongfully and unlawfully has been expanded into a book.[2] He was convicted on five out of thirteen Articles, sentenced to removal from office and disqualification from holding any office of honour, trust, or profit. The history of the subject is traced back to the States' Convention of 1787, and the provisions therein made for the removal of a President, on impeachment and conviction of malpractice or neglect of duty. The book deals with a number of questions, such as—the capacity in

[1] The *Counsels to Diplomatists*, chap. ix., vol. i., will, also, doubtless be of great service to them.

[2] *A Treatise on Federal Impeachments*. By Alex. Simpson, Jr., LL.D., of the Philadelphia Bar, 1916. (Published by the Law Association of Philadelphia.)

which the Senate sit upon a trial of impeachment—the offences embraced under the language "treason, bribery, or other high crimes and misdemeanors" (it appears to be established that impeachments can be made for other than *indictable* offences)—whether an officer can be impeached for offences committed before his induction into office—or after he has ceased to be a civil officer of the United States—the rules of evidence—the right of accused to a jury—the attendance of senators—the adequacy of impeachments as a remedy—and suggestions for changes in procedure. An Appendix contains what is claimed to be the only complete list of the English Impeachments Trials. The author criticises the list of such trials in England (fifty-four from 1621 to 1805), given by Sir Fitzjames Stephen in his *History of the Criminal Law of England* and purporting to be complete, as being incomplete and inaccurate. This Appendix will be handy for reference as a collection of precedents, with the articles of impeachments and results set out. The case of Warren Hastings occupies twenty-one pages—a case which Stephen regarded as a blot on the judicial history of the country: he thought it hardly possible that so cumbrous and unsatisfactory a procedure would ever be resorted to again. In the United States, also, impeachment is admitted to be cumbrous, and is therefore limited to the great officers of State, though many thousands of federal officers are subject thereto. As a practical remedy impeachment is applied only to judges. Of the previous impeachments one was of a President (Andrew Johnson, in 1868, acquitted), one of a Senator, one of a Secretary of War, the other six were of judges. The author has some sound observations on the appointment of incompetent judges in the United States, and the desirability of some power and procedure for their removal from office without a formal impeachment. In England this treatise will be of more academical and antiquarian interest than practical value, as impeachments are in abeyance or obsolete, but may be useful in the United States where they are more frequent.

C. E. Buckland.

THE DEFINITION OF "DROIT."

M. Lévy-Ullmann has published the first instalment [1] of a work intended to serve as an introduction to the study of law, which is to be followed by three further instalments dealing respectively with the following subjects: (*a*) a survey of the domain of law; (*b*) the conception of law; and (*c*) the evolution of law. After giving a careful analysis of the definitions of the term "droit" contained in Justinian's compilation

[1] *Éléments d'Introduction génévale à l'étude des sciences juridiques.* Par Henri Lévy-Ullmann. Vol. i. La définition du droit. 172 pp. (Paris: Librairie de la Société du Recueil Sirey, 1917.)

the author criticises with much acumen those put forward by French writers, beginning with the classical commentators of the Code Civil (Toullier, Demolombe, Aubry and Rau, etc.), but devoting his principal attention to the views expressed in the monographs of living authors, among whom Beudant, Gény, and Duguit are specially singled out.

The last part of the book is devoted to an inquiry as to the best method of finding a definition and winds up with the formulation of such a definition.

It is to be regretted that the author—who is evidently familiar with the work of German philosophers and jurists on his subject—does not appear to be acquainted with the corresponding English literature.[1] A glance at that literature would have called his attention to a defect affecting the terminology of continental countries from which fortunately English terminology does not suffer. As pointed out by Sir T. E. Holland, expressions such as "'jus,' 'Recht,' 'droit' . . . denote not only the sum total of *laws*, but also the sum total of *rights* ('jura,' 'Rechte,' 'droits') and the sum total of *all that is just* ('justum,' 'Recht,' 'droit')."[2]

Continental writers find no difficulty in distinguishing between the first mentioned and the thirdly mentioned use of the word, as they can avail themselves of words like "loi" and "Gesetz,"[3] which denote the "sum total of laws" as contrasted with the "sum total of all that is just," but the use of the word for the sum total of *laws* and for the sum total of *rights* has led to endless confusion and to the sterile discussions about the relations between "droit subjectif" and "droit objectif" which occupy much space in continental literature and which also figure very conspicuously in the book under review.[4]

[1] For English definitions of the term "law" see Holland, *Jurisprudence*, 12th ed. pp. 1–42; Pollock, *A First Book on Jurisprudence*, pp. 1–30; Rattigan, *The Science of Jurisprudence*, pp. 3–28; Salmond, *Jurisprudence*, pp. 9–10. For an elaborate analysis of the term "Law of Nature," see Lorimer, *Institutes of Law*, 2nd ed. Dumont's French version of Bentham's writings is referred to by the author, but only for the purpose of showing that he has failed to give a definition.

[2] Holland, *Jurispr.* 12th ed. p. 12.

[3] The German word "Gesetz" is sometimes used in the narrower sense of statute law, but the German Civil Code uses the expression as a comprehensive term including every legal rule (jede Rechtsnorm)—Statute introducing the German Civil Code, Art. 2.

[4] M. Duguit, whose work on "L'état, le droit objectif, et la loi positive" is much referred to in the book under review, says in a passage quoted on p. 110: "pour bien faire, on devrait écarter l'emploi du mot 'droit' au sens subjectif." M. Lévy-Ullmann wishes the term to be preserved, as an indication that the law does not merely exist for the sake of the community. but also for the protection of individual interests. A reference to English legal literature would have shown him that the protection of individual rights is recognised as an object of law notwithstanding the fact that the word "law" does not denote an aggregate of *rights* and is therefore identical with "droit objectif."

Some of the writers quoted by M. Lévy-Ullmann recognise that the word " droit " conveys different meanings according to the occasion for which it is used and supply separate definitions for each meaning, but against these " définitions multiples " he upholds the necessity of the " définition unique " which does justice to all the different meanings which the word conveys. His own definition is carefully thought out, but if he had examined it with the same power of dialectic which he applies to the other definitions it would not have survived. According to him " le droit " is " la délimitation de ce que les hommes et leur groupements ont la liberté de faire et de ne pas faire sans encourir une condamnation, une saisie, une mise en jeu particulière de la force ! " It would occupy too much space to demonstrate the insufficiency of this definition ; I can only indicate some of its faults. Its inadequacy is mainly due to the fact that it leaves out of account the whole of the " droit " which—to use Sir T. E. Holland's words—represents " the sum total of all that is just." M. Lévy-Ullmann praises Aubry and Rau's definition on the ground of its embracing the " droit naturel " as well as the " droit positif " (see p. 57), and of its including international law as well as municipal law (p. 58), but his own definition, unless interpreted in a very liberal manner, would not be understood to cover such a wide area.

A second defect is the absence of any indication as to the authority by whom restrictions of human liberty by means of the application of force deserve the name of law. The events of the present time offer sufficient illustrations of the fatal character of this omission.

The fundamental fallacy of the procedure adopted by the author is due to the fact that he tries to comprehend the manifold meanings of the word " droit " in one definition. His aim is to " réaliser sur l'unité de notion l'unité de définition " (p. 51), but on his own showing this " unité de notion " is non-existent.

Moreover the attempt to find a solution of the problem by the light of " pure reason " could not in any case lead to a convincing result. The student of law finds himself in the presence of two facts. In the first place he finds the conception of an ideal law recorded in the historical annals and in the literature and art of all civilised nations ; secondly he is able to study the evolution of the institutions collectively forming the positive law of each separate municipal or national unit, or regulating the reciprocal relations of such units. The investigation of these facts discloses a constant process of change in the mental conceptions as well as in the operative institutions, and it follows that every attempt to find a definite and immutable formula for the central conception must of necessity prove futile.

To a student of the science of law the history of the conception of the ideal of law and of the evolution of legal institutions and the comparison of the ideals of the various schools of thought and of the institutions of

various countries is of infinitely greater value than the mere logical analysis of such terms as "law," "justice," and "right." Judged by this standard a work purporting to deal exclusively with "la définition du droit" would at first sight not appear to be a suitable textbook for a first year's student, but M. Lévy-Ullmann's book really does a great deal more than its title promises, and in fact its merits are most conspicuous in the parts which are merely historical or descriptive. What better illustrations of men's varying conceptions of legal right could be given than the scene in the cross roads where Œdipus meets his unknown father (p. 28)? What more illuminating instance could be discovered of the working of an ancient legal institution than the procedure on an adjudication in a boundary dispute of which an account is given with every picturesque detail (pp. 140–141)? The views of other writers are not set out as dry dogmatic formulas, but with a liveliness of appreciation and a limpidity of expression which appeal to the imagination not less than to the logical faculties. The present instalment of M. Lévy-Ullmann's work does not profess to deal with the topics referred to above as the most important from the student's point of view; it must be assumed that they will to a large extent form the subject matter of the fourth instalment (l'évolution du droit), but the illustrations used in the criticism of the various doctrines and definitions convey a preliminary idea of the nature of these topics and of their human interest which cannot fail to stimulate and to awaken thought.

E. J. S.

WORKMEN'S COMPENSATION IN THE UNITED STATES.

Mr. Kiser has presented in the form of a connected story,[1] supported by generous footnotes, the law relating to workmen's compensation as it exists in the United States. Workmen's Compensation Acts have been enacted in thirty-two of the States and in Alaska, Hawaii, and Porto Rico as well. There is also the Federal Act which extends to all United States civil employees. Each State apparently felt that it could improve on the legislation of its neighbours, so that while there is a common purpose in this branch of legislation, it was sought to attain that purpose by different routes. The task undertaken by Mr. Kiser was accordingly to bring under the various headings of a single article the substance of thirty-five different statutes, each with its own incrustation of case law.

In these circumstances generalisation becomes necessary, but in a law treatise generalisation is bound to be more or less unsatisfactory. It cannot be adequate for the purposes of the practitioner to be told that

[1] *Workmen's Compensation Acts: A Corpus Juris Treatise.* By Donald J. Kiser. Pp. 146. (New York: The American Law Book Co.)

" the Compensation Acts ordinarily contain a schedule of specific injuries to which attach specific awards of compensation " or that " the statutes usually contain definite schedules of the amounts of compensation to be paid to persons in particular relationship to the deceased employee," and to find that the notes give no more detail than is contained in the intimation, " see statutory provisions." Nevertheless, there is much in the closely printed pages that must interest the student of comparative law. He will find that points of difference from the English Act are many and important. For example, in some of the States the Court is empowered to grant a provisional daily allowance to the employee pending the determination of his application for compensation. Some of the Acts enable a party appealing against an award to take the verdict of a jury on any question of fact involved. Washington State, alarmed possibly by the vast quantity of reported decisions that have been necessary for the interpretation of the words " injury by accident arising out of and in the course of the employment," omitted the phrase altogether from its Act, with the result that the statute has been held to insure the workman absolutely against injury received when on his employer's premises. Some States follow the English method, whereby the employer bears the cost of compensation; others follow the German plan and require provision to be made for the creation of an insurance fund by means of the collection of premiums from employments included within the scope of the Act. Some of the Acts are compulsory; others are optional.

Of much interest are the references to the social and economic aspects of this branch of legislation which are scattered about the text and in the judgments quoted. It would be difficult to improve upon Mr. Kiser's statement of the economic basis of workmen's compensation legislation, namely, the shifting of the burden of the economic waste entailed by industrial injuries " from the employee to the industry, in order that it may ultimately be borne by the consumer as a part of the necessary cost of production."

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